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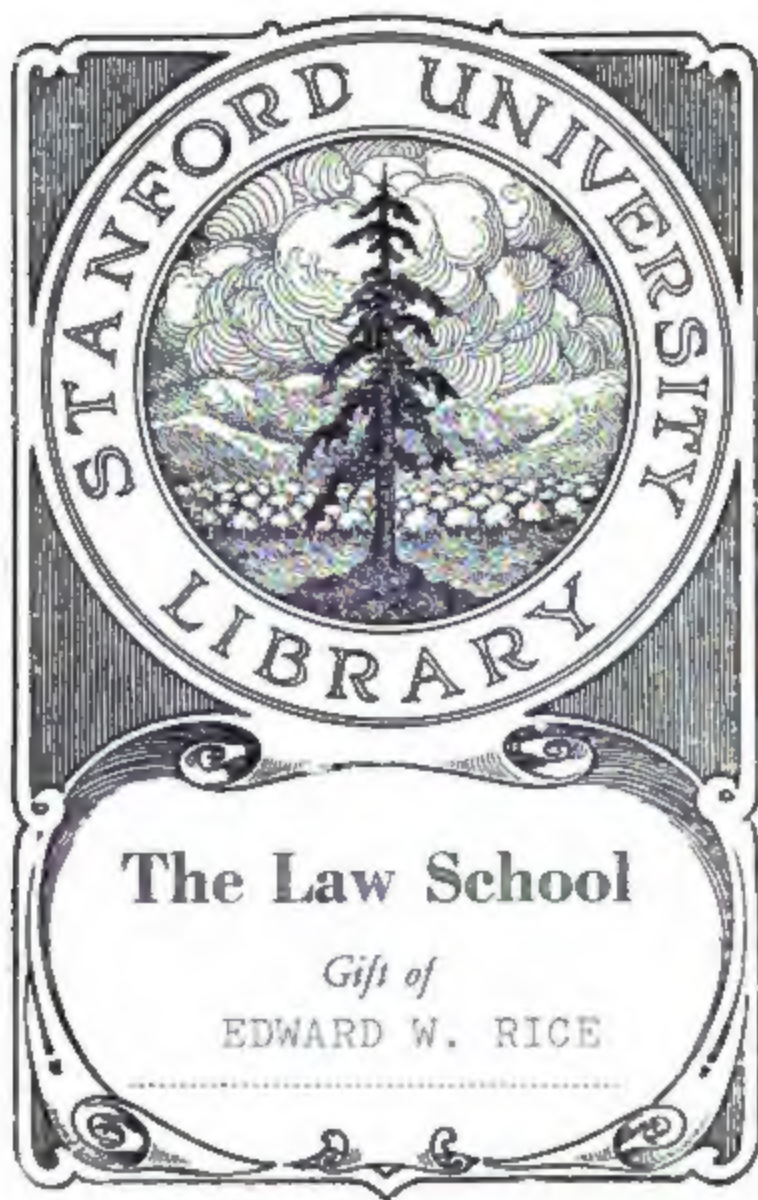
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John *Lloyd*
AN
E S S A Y

ON THE
LEARNING

RESPECTING THE
CREATION AND EXECUTION
OF

P ● W E R S;

AND ALSO RESPECTING THE
NATURE and EFFECT of LEASING POWERS

IN WHICH

The Doctrine of the Judgment delivered by the Court of *King's Bench*,
in the Case of *Pugh* and the Duke of *Leeds*, and the Principal
Authorities for and against it, are considered.

By *JOHN JOSEPH POWELL*, Esq.
BARRISTER AT LAW OF THE INNER TEMPLE.

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**A T R E A T I S E on the L A W
of M O R T G A G E S.**

The Second Edition,

REVISED, CORRECTED, and ENLARGED.

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TO THE HONORABLE
THOMAS ERSKINE
ATTORNEY GENERAL TO HIS ROYAL HIGHNESS
THE PRINCE OF WALES

THIS ESSAY
IS,
WITH THE UTMOST DEFERENCE AND RESPECT
INSCRIBED,

AS A TESTIMONY,
OF THE HIGH SENSE THE AUTHOR ENTERTAINS
OF THE HONOR OF
HIS EARLY FRIENDSHIP AND GOOD OFFICES
AND OF
THE JUST ESTIMATION IN WHICH HE HOLDS
HIS EMINENTLY DISTINGUISHED CHARACTER,
KNOWLEDGE, AND TALENTS.

TO THE
R E A D E R.

AS the Author of the following Essay, has in some sort pledged himself to the Profession, for the production of a treatise upon the Constitution and Construction of Devises; he might possibly, if he were not to explain the occasion of bringing the following tract forward at this period, be considered as having abandoned his former design, as a task, the prosecution of which, he found too arduous for him to accomplish: but that is far from being his intention. That object is a favourite one, and the difficulties he has already combatted, and those he still expects to meet with in the execution, serve only as stimulatives to additional attention and application. Whatever labor may occur in wading through the almost infinite variety of matter, which it is necessary to consider in order to accomplish an object so extensive, as that of reconciling the various particular instances that the law of devises has furnished, by tracing them up to their immediate principles, and again, by pursuing those principles to the primary and fundamen-

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mental rules from which they emanate, the variety of knowledge that such a pursuit offers, will make ample amends to a persevering and inquisitive mind ; the author therefore, does not mean to give up that undertaking, nor to delay the accomplishment of it for a longer period than the extensiveness and importance of the subject renders absolutely necessary.

Among other materials, that were to be looked into, in the consideration of the law of devises, those that furnished information respecting powers, presented themselves, as forming a very important and extensive source of information : and the author, in pursuing his inquiries, and arranging his matter on that branch of the subject, found, that to do it justice, it could not be comprised in a treatise in which it was only to form a secondary object of enquiry ; he therefore chose to pursue this branch of legal learning through its various and complicated heads, before he compleated the more extensive plan on which he at first set out. By this means, he flattered himself, that he should escape from the censure of being dilatory in performing his promises, and also, gain time and opportunity for a revision, and more full consideration of the materials, which he had already collected, and arranged on the subject of devises in general.

Having thus far explained the motives which have brought forward the present publication, in
lieu

lieu of that previously promised, it will not, he trusts, be deemed impertinent in him, to state the nature and extent of the following treatise.

In its nature, it is no more than a compilation of the desultory and loose materials, respecting powers (which are to be found in our abridgments and books, without reference to principles, without method, and without system), under particular heads, with such observations as may conduce to the bringing the law on that subject into one point of view, by a systematical arrangement of the learning to be found respecting it.

In extent, it goes no further than the consideration of the nature, origin, and properties of powers, and the manner of carrying them into effect, which involves in it the subject of their legal and equitable executions. Of the construction of the words, constituting powers, little or nothing is here offered, because the rules of construction, applicable to powers, are to be found in those authors who have already treated on the subject of uses.

Rules of construction, as applied to expounding instruments in writing, are a branch of the law of evidence, being modes adopted for regulating the course of inquiry, to ascertain the fact of what was the intent of the parties to a written instrument, at the time of making it, in that manner which seems best adapted for coming at the truth

respecting it. And the first principle of evidence being, that no evidence shall be received, but that which is in itself the best that can be procured respecting the subject to which it is to be applied, it follows, that the grand fundamental rule of construction is, that every instrument shall speak for itself, and not be explained by parol evidence; for, as every instrument furnishes in itself written evidence of the intent of the parties in making it, to admit it to be explained by parol evidence, would be to suffer the stronger evidence to be controuled by the weaker, because, mere verbal testimony is liable to misrepresentation, either by addition to, or subtraction from what actually existed, whereas writing is in no sort subject to that inconvenience.

Every instrument, therefore, may be considered as furnishing *in itself* the best evidence of the intent of the parties to it. This evidence is either positive or presumptive, according to the manner of wording the clauses of any particular instrument. If the maker of an instrument convey his intention in plain unequivocal language, that language, of course, furnishes positive evidence of his intent, because every man must be presumed to have intended to have done that, which, in express terms, he has actually done. This is a necessary consequence of the *theory* of language. Language consisting of certain articulate sounds, by the common consent of mankind, who use them, not upon the account of any natural connection between

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articulate

articulate sounds and certain ideas, but *arbitrarily*, and by *voluntary imposition*, made *fixed* signs of certain ideas. These sounds it is the object of the *characters* made use of in written instruments to represent. It follows, therefore, of course, that every man, expressing in writing these sounds by the characters that represent them, must be considered as meaning to convey thereby to his reader, who is to decypher those characters, *the ideas* which those sounds that are represented by those characters import, or are fixed signs of; for, it is with this view common usage, by a tacit consent, appropriates *certain sounds* to *certain ideas* in all languages, and thereby limits the signification of each sound: As, otherwise the grand object of language, which is the ready and accurate communication of ideas from man to man, would not be effected, because, unless a man's *words*, either spoken or represented by written characters, excite the *same* idea in the *bearer* or *reader*, which he makes them stand for in speaking or writing, he cannot speak or write *intelligibly*.

In all cases, therefore, where the parties to a written instrument make use of *characters* representing *sounds* or *words*, the ideas annexed to which are *clear*, *positive*, and *limited*, the fixed rule of construction is, that those *clear*, *positive*, *limited* sounds or words shall be taken to import *those* ideas of which they are *fixed* signs, this being their proper and immediate signification. For, in all questions

of construction, the single object of enquiry is, *what ideas* the fabricator of the instrument *intended* to convey thereby, in order to carry his ideas *into* effect.

Now, as we can only come at what a man's ideas are, or were, at the time of his expressing them either in writing or speech, from the characters or words that he has made use of to convey those ideas to us, we cannot be at liberty to argue from presumptive proofs, that a man *intended* by his words or characters, to convey *one* idea, when the words or characters, which he has himself used, furnish *positive proof*, that he *meant* to convey *another* idea to us, by his having *actually* conveyed to us that other idea by *proper* words or characters; for, if we were so to do, we should thereby destroy the medium of intelligence between mankind, and instead of carrying into effect the ideas of the speaker or writer, so conveyed to us by their proper signs, carry into effect *our own* ideas *arbitrarily* annexed to signs which are *not proper* representatives of them. Therefore, as, where on an indictment of one for a robbery, positive evidence is produced, that the person charged went out with several others, with an intent to commit a robbery, and that they attacked a stranger upon the highway, knocked him down, and forcibly took from him his money; those facts, constituting the crime of robbery, so positively proved, cannot be controverted by offering testimony, that he who is the

subject

subject of the criminal charge, and who, with others, committed those acts of violence, was a gentleman of independant fortune, unembarrassed circumstances, acknowledged integrity, and exemplary piety; so, in like manner, where a deed furnishes *positive* evidence, by being conceived in *clear* and *unequivocal* terms, that a man means to do such and such an act thereby, the proof that it was his *intent* to do that act *cannot* be *controverted*, by proving that the act he has attempted to effect, is not within his capacity to accomplish, and that from his situation in life, the circumstances of his family, the interest he possessed in the subject on which the instrument is to operate, or *other* circumstantial considerations, he could not mean to do what his words or phrases import to have been his intention. And, as in the former case, *no* circumstantial evidence, however strong, can amount to *proof*, that the *fact* established by positive evidence of equal credibility did not exist; in like manner, in the latter case, no *circumstantial* evidence arising out of the instrument, can controul the *positive* evidence that the instrument *itself* furnishes. Indeed, were the rule of construction otherwise, it could no longer be properly called by *that* name. It might with more justice be called *making* an instrument than *expounding* it; for, if the expounders of an instrument were at liberty to *understand* the sounds represented thereby, to convey *different* ideas from those which, in their *natural*, *universally* received, and allowed import, they signify,

signify, it would be *made* by the expounders, *not* by the parties to it. The rule of construction therefore keeps pace with the rule of evidence, considering that as done, which the instrument imports, and proves positively to have been done; *leaving* the consideration of the *efficacy* of the instrument out of the question, and *taking it for granted*, that the party intended to do what he *has* done, not adverting to the *reasonableness* or *unreasonableness* of his intent, or to his *capacity* of effecting that intent; for, *the presumption* that he has *mistaken* his capacity is *stronger*, than the *presumption*, that, *doing* what he has *positively* and in *express* terms done, he has done *that* which he did *not intend* to do.

But, if a deed be conceived in language that is ambiguous, the sounds, represented by the characters used, being capable of expressing *several* ideas, the evidence of the intent of the makers of the instrument, in using those sounds, furnished thereby, would be *only* presumptive and circumstantial; and the construction to be given to the words or phrases used therein, would be one way or the other, *according as* the circumstances, to be collected from the *face* of the deed, furnished arguments to shew the intention of the maker of it, to have been to use those words or phrases one way or the other.

Therefore, as, where a fact is in its nature capable of being viewed in different lights, that light
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in which the fact is to be taken, may be ascertained by any evidence that furnishes a presumption either the one way or the other. As, if one be charged with the crime of stealing, and evidence be given, that the person charged did take a sword in the street privately from the side of the prosecutor, this evidence would furnish proof of all the positive ideas necessary to warrant a conclusion, that this was a stealing; yet, the act would be equivocal, because *every act* of taking a thing from another privately, is not a *crime*, for, to constitute the crime of stealing, *another* idea, in its nature relative, is requisite, namely, that the private taking was with an intent *contrary to the rule of law*, without the existence of which intent, the private taking is *no* crime. Therefore, as, whether this intent, contrary to law, did exist; or not, stands *indifferent* upon the abstract circumstances, any evidence that furnishes a ground to presume, that the party taking, did not take with an intent contrary to law, would be relevant and admissible. In such case, then, if it be shewn, that the person from whose side it was taken was disturbed in his mind, although not under personal confinement, and, that the person who privately took the sword from him, knew his infirmity, and had followed him with intent to get the sword from him, and, from his general character, could act from no other motive, than that of preventing mischief; this evidence would defeat the charge, because the act being, on the facts proved, *ambiguous*, affords a *proper* foundation

foundation for the admission of evidence, which furnishes a presumption the one way or the other. So, where the words, in which an instrument is conceived, are of such a nature as to admit of an *equivocal* sense, and, *consequently*, to leave the intent *doubtful*, there, the relative situation of the parties to the deed, the object with a view to effect which it was made, and other circumstances arising in, or issuing out of the instrument, may be resorted to, in order to ascertain *from thence*, in what sense such equivocal words or phrases were *meant* to be used.

Now, to apply these observations to the subject of powers. If the owner of an estate convey it to trustees upon trust to certain uses, and reserve a special power to himself, by an instrument in writing, sealed and delivered in the presence of three witnesses, to revoke those uses, and declare others. And he also, in the same instrument, by another clause reserve to himself a general unlimited power of alienation. Although these powers are contradictory to each other; for, by the one, a man absolutely restrains himself from doing any act to affect his estate, but in such and such a precise manner; and by the other, he retains to himself an absolute unlimited power, to affect it in any way that the law will permit him to do as proprietary; however oppositely these powers operate*,

* Vide *Fitzgerald v. Fauconberge*, *infra*, 283, 287.

or howsoever unreasonable such a conduct seems to be; yet, as the owner of the estate, who has an absolutely property in it, and may do as he pleases with it, has, in express terms, made such a limitation, and his words positively effect that, and, thereby, shew his intent that such limitation should take place; the law will so expound the deed as to carry that intent, being plainly and unequivocally declared, however strange and inexplicable it may be, into execution. But, if the owner of an estate, for private reasons, thinks proper to put it into such a situation that he thereby leaves himself no legal right to dispose thereof, unless by exactly pursuing certain forms which he thereby prescribes to himself; and, in prescribing those forms, he makes use of words and phrases which admit of an equivocal sense, it being necessary to ascertain how the settlor has disposed of it precisely, some construction must be put upon these words. In order then to be enabled to construe them, we must dive into what was his intent as to the form he meant to prescribe to himself. We can have no evidence of that intent, but from the deed, and that furnishes no positive evidence, because it is conceived in equivocal terms. We must then examine into what facts the instrument itself furnishes, from whence we can raise a presumption, that these equivocal words were intended to be received in one sense in preference to another. In such case, the facts which seem to be deducible from the deed are these, namely,

namely, that, the maker of the deed was the owner of the estate; that, in the act he was about when he made the instrument, he was putting himself under restrictions to which by law he was not subject, and, consequently, curtailing those powers and privileges which ensue the plenitude of ownership. Then, as the disposition of man (generally speaking) is rather to enlarge his capacity of acting with respect to his property than to narrow it, the facts, apparent on the face of such a deed, furnish strong presumptive evidence, that the owner of the estate did not intend by such instrument, to restrain himself further than the words he *used, imported*, when taken in their narrowest, loosest, and least strick sense. Such restraining words or phrases, therefore, when used by the owner of an estate, confining his ownership to be exercised only through the medium of a power, ought to receive a liberal construction, and such as is most favourable to such owner.

On the other hand, if the owner of an estate, for purposes of his own, enable others, strangers to him, to exercise acts of ownership, respecting his estate, but in authorising them so to do, he annexes certain restrictions to attend the execution of this delegated authority; and, in limiting those restrictive circumstances, makes use of equivocal or ambiguous language, which, in one sense thereof, will operate to require a greater degree of formality, than it will in another sense. As the disposition
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tion of mankind, (generally speaking) is to use great caution in permitting others to exercise acts of ownership over their estates, and as such restrictions are there placed with a view to protect and take care of the owner, or his representative entitled to the estate subject to the power, such a deed furnishes facts, from whence presumptive evidence may be deduced, that the creator of the power so circumstanced, intended that the restrictive words there used should be taken in their most efficacious sense; in such case, therefore, they should be expounded with respect to the donee, according to their most enlarged and operative import.

Again, if a father meaning to make a family arrangement, settle his estates on his children in certain proportions, and then add a clause of revocation, by which he vests an absolute power in one child, at his will and pleasure, to revoke those uses, and to limit new uses in favour of any person at his discretion. It would be of no avail for the other children to argue against a revocation and new limitation made by such child, that this power was unreasonable; inconsistent with their father's primary intention; subversive of every thing previously done by him; and expressly declared to be meant by the deed, when it *stated* that it was done with a view to a family arrangement. The owner of the estate has so settled it, and his act cannot be controverted.

But,

But, if a father, intending to divide his property among his children, arrange it by deed, in such and such a manner, and then add a clause of revocation to be executed by one child, which is conceived in such terms as that it may be intended either to extend over the whole or a part of the estate settled; *there*, the relative situation of the creator of the power, the object of the deed, and the like circumstances may all be taken into consideration, and afford evidence, that the words in which such power is conceived, were intended to be taken in their most narrow and least operative sense.

It, may here be observed, perhaps, that, in order to get at the relative situation of the parties, or state of the subject on which the instrument is to operate, parol evidence must frequently be resorted to; for, it may happen, that, although a deed be made with a view to a family settlement, yet, it may not be expressed so. The observation is certainly well founded. Then, it may be said, that there are cases in which parol evidence is admitted to explain a deed. Where then is the line to be drawn? The answer is obvious. All rules of law established for particular purposes, must, *in the application* of them, be referred to the *intent* and *object* of their institution; And, if the *mischief*, that it was the intent of any particular rule to obviate, or the *object* which it was the intent of a particular rule to attain, does *not* exist in the case,

case; the rule does not apply. Now, the mischief intended to be obviated, by rejecting parol evidence relative to written instruments, thereby to explain them, is the danger of prevarication and misrepresentation; and the object of the rule, is, to obtain a knowledge of the intent of the makers of an instrument in that manner, which seems most likely to lead to truth respecting it. If, then, the state of *a fact* essential to be known, in order truly to construe a deed, but which cannot be ascertained, but by evidence *debors* the deed, be of such a nature, that it does *not* admit of misrepresentation or prevarication respecting it, *the mischief* that it was the object of the rule to obviate, does not exist. To prevent the evidence of the state of that fact, then from being received in such case, would be to defeat the object which the rule was made to attain, namely, the rendering the avenues to truth plain and clear; for, to adopt the rule of rejecting parol evidence of the state of a fact, material to be known, in order to the true construction of a written instrument, but *not attainable* without the admission of that evidence, when the admission of such evidence would *not* be attended with the mischief that it was the object of the rule to obviate, would be unnecessarily to obstruct those paths that lead to truth, and to leave that *to conjecture*, which is, in itself, capable of being *certainly* ascertained. In such case, therefore, the instance *not* furnishing the mischief which it was the object and intent of the rule to prevent,
and

and the application of the rule, in such case, tending to defeat the end by the means; the rule ought not to be applied to the case; *ex gratia*, if the ascertaining with precision the relation in which the parties in an instrument stand to each other, will furnish evidence from whence we may deduce in what sense equivocal or ambiguous words, used therein, are to be taken, and that cannot be ascertained without admitting parol evidence, the question will be, whether the admission of such evidence, would be against the rule, *that parol evidence should not be received to aid in the construction of deeds*?—The answer would be, that it would not. First, Because the identical fact, respecting which the evidence is to be given, stands upon the face of the deed *ab initio*, and the evidence required, only goes to explain the *precise state* of that fact, in order from thence to ascertain how far the state of that fact may or may not influence the construction. Thus, if *A.* convey a certain subject, as land or money, to *B.*, upon trust, as to particular parts of it, for *C.*, *D.*, and *E.*, and *A.* be the father, and *C.*, *D.*, and *E.*, his children; *A.* and *C.*, *D.* and *E.*, stand, upon the face of that deed, in their relative situations to each other, although the precise nature of that relation is not expressed upon the face of the deed. In such case, therefore, the parol evidence is not resorted to, to explain the effect of *the words* of the deed, or to shew that the words were meant to operate one way or another, by evidence *dehors* the
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the deed, but, only, to shew in what capacity or relative situation, *A.*, and *C. D.*, and *E.* stand upon the instrument, in order, from thence, to ascertain with precision what evidence the *instrument* itself, *upon the face of it*, does really furnish, as to the intent with which equivocal or ambiguous words were used; for, if the words be *not* equivocal or ambiguous, the relative situation of the parties would be *immaterial*, because it could not affect the construction of the instrument. Secondly, Because the fact of the natural or civil relation of the parties, cannot be prevaricated about or misrepresented; for, it admits of being ascertained with absolute certainty, and must remain the same when the instrument is to be construed, as it was when the instrument was made. So, if the precise ascertainment of the state of the subject, on which the ambiguous words or phrases in the instrument are to operate, would tend to furnish evidence from whence an inference might be drawn, as to the sense in which those words or phrases were used, *that*, it seems, might be explained by parol evidence without infringing upon the rule. First, Because the subject itself appears upon the face of the deed, the evidence is only to ascertain with precision the state of it in quantity or quality. Secondly, Because the state of that subject is not a fact resting upon memory and subject to misrepresentation, but capable of being ascertained with mathematical certainty. To apply the rule therefore, in either of these cases,

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would

would be to make it the means to defeat its own end, by reducing the expounders of the instrument to the necessity of making a construction upon the intent *at hazard*, when evidence might be had, *not within the mischief meant to be prevented by the rule*, whereby the intent might be ascertained with certainty.

In this respect, as in all others, the rule of construction agrees with the rule of evidence; *ex. gra.* that a man cannot be an evidence in his own cause, is a general rule; but it admits this exception, namely, if he come to speak against himself, or to charge himself; for, in that case, he is the best evidence that can be offered. Why? because there is no danger of the mischief that the rule means to obviate. The law will be the same if, which ever way the event of the cause turns, the witness will be equally affected; thus, a father may be evidence to bastardize his own child, *if it be not reputed legitimate*, to charge a parish with its support, because if the child be legitimate, he is bound to keep it by the 43 *Eliz.*, and if it be a bastard, he must indemnify the parish charged with it by the 18 *Eliz* *.

Again, where from the nature of the transaction, none but interested witnesses can be had, such

* Parish of St. Peter in Worcester v. Old Swinford, Easter 8 Geo. 2. B. R. Buller *Ni.Pri.* 112. S. C. Burrough's Sett. Ca. 2.

witnesses,

witnesses are admitted from necessity ; as where one brings an action to recover, on the statute of *Winton*, property of which he has been robbed. So, though husband and wife cannot be witnesses for or against each other, being considered, in law, as one person, yet the wife is a competent evidence to prove criminal conversation between another and herself, on an action brought by the husband* ; the reason is, that, from the nature of these facts, the former being most likely to happen when a man is alone, and the latter being generally carried on with that secrecy that prevents any other person from being cognizant of it, they admit of no other evidence, than that of the parties present ; and, therefore, if the rule were applied to them, *it would defeat its own object*, the development of truth.

These observations, upon the rules of construction, seem to be all that are necessary to be here offered upon that subject, and will go very far in enabling us to determine, in what cases, and to what extent, circumstantial evidence furnished by, or arising out of, the instrument creating a power may be made use of : provided that we always keep in mind this universal principle, namely, that where words or phrases are in themselves *clear, precise, and significant*, no resort can be had to cir-

* King v. Reading, Ca. Temp. Hardw. 82.

cumstantial evidence, to warrant us to put a construction upon them contrary to that which is their proper import, because, so to do, would not be to construe, but, to make a deed; *for, it is the same thing, in truth, whether we strike one set of words out of a deed, and insert another set of words in the room of them; or give to one set of words a meaning, by construction, which another set of words, only, properly import.*

Having premised thus much upon the general scope of the following sheets, the author now leaves them to that profession, from whose candor and favor he has already received the greatest encouragement, trusting, that though the subject be more abstruse, yet it is not less useful or interesting than that, which he has already had the honor of submitting to the public.

Those who are in the habit of considering questions respecting the law of real property, will find nothing here that will not, on reflection, be perfectly familiar to them; and those, who are less acquainted with these subjects, may console themselves in the language of a celebrated author, *Hæc dum incipias, gravia sunt, dumque ignoris: ubi cognoris, facilia.*

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The Reader is *particularly* requested to attend to the following
Corrections :

Page.	Line.				
3	1	after	was	insert	a
4	17	—	donor	—	or other person to whom
			he delegated		such appointment or nomination.
15	15	pro	or	read	of
16	4, 8, 12	for	trustee	—	donee
	5	—	simply	—	simple
36	6, 11	—	E. B.	—	E. C.
42	5	—	simple	—	single
84	17	—	a mere instrument	read	merely to apportion
88	3	—	He	read	the court
101	19	—	always	—	all ways
134	27	—	lose	—	loose
145	20	—	Ann	—	A.
148	8	—	these	—	the
151	last line	—	district	—	distinct
161	24	after	child	insert	the husband and wife, &c.
185	in margin	for	supra	read	infra
216	10 in margin	—	1 Ch. Ca. 246.	read	1 Ch. Ca. 263.
308	9, 17	—	lease	—	lease for years
350	21 in margin	add	Fitagib. 156.		
403	16	for	such rent	—	rent
404	14	—	would	—	would not.
407	11	place inverted	comma after	lands, and omit it after	out
411	24	after	rent	insert	the Earl made a lease
420	3	pro	in	read	on
452		pro	Holt and Hales	—	a Hale and a Holt
454	26	for	or distance of time	read	of distance or time
457	16, 17	—	day after the octave of the term which was the day,	read	day of the term which was the day after the octave.
465	25	leave out	or remainder-man		
479	in margin	for	Andrews	read	Anders
497	8	—	Querela	—	Querela
528	26	—	exclusive	—	inclusive
525	24	—	from	—	upon
535	29	after	in law	add	when applied to the point in question
566	27	—	attaches	—	or otherwise
570	21	pro	versus	read	verus

OF THE
C R E A T I O N
A N D

Execution of Powers.

FROM the nature of alienations of real property at common law, and the mode of effecting them by feoffment and livery of seisin, it is very certain that they did not admit of the annexing to them a power of revocation or appointment; for the strictness of those times would not countenance a repugnancy, which a man's giving an estate *absolutely* to another, and *yet reserving* to *himself* a liberty to *recall* it from the feoffee at pleasure, or to *determine* it, and *create* a *new* estate to another without a new livery, appears, in theory, to be. Nor was an operation of this kind consistent with that public notoriety which the policy of our ancestors deemed a necessary circumstance in the alienation of property. The only means therefore, that our ancestors had of retaining any authority over real property after alienation, was, by annexing a condition

Co. Litt.
237. a.

tion to a feoffment, that, on the tender of money, or, of other thing performed by the alienor to the alienee or his heirs, as stipulated between the parties, the alienor should have a right of re-entry; so that the estate which was divested out of the alienor by the livery of seisin, might be re-vested in him by a performance of the condition and re-entry.

But, when the doctrine of uses was introduced, this difficulty no longer subsisted; for, though such a shifting of estates was repugnant to the nature of common law conveyances, yet it was perfectly agreeable to the nature and intent of an equitable use, which had for its main object, the enabling the owners of real property to dispose of their estates in any manner most agreeable to themselves: and this distinction (between an use and a legal estate) will appear evident from considering the nature of an estate in land at common law, as opposed to that of an use in equity.

Land is a solid substantive, standing of itself without any dependance on any thing else; the possession of which was transferable from one to another by the visible symbolical act of livery *only*; the most du-
2
rable

rable interest therein was fee simple. When this interest then was destroyed by a condition; the possession of the land, on entry thereupon, was revested in the original owner and could not pass out of him again without a new livery. But an use was an *accident* attaching upon the *legal* possession, and built thereupon by civil equity. Its *essence* was no more than *a confidence* reposed in him who had the possession to this *effect*; namely, that, *so long* as that possession continued, he should admit the feoffor to take the profits, and should make such estates as the feoffor required. *That*, then which we call *a limitation* of an use, is no more than the direction of a trust, prescribed by the feoffor to the feoffee, which direction might be subjected to such conditions and limitations as the donor pleased. The donee was bound, *in equity*, to perform the trust according to these directions, so long as the possession remained with him. From hence it followed that the feoffor might limit an use in fee simple to one, upon condition or limitation, and, after the determination of that use, to another; all which limitations were performable by the donee; because his *possession* that he had received subject to the *trust*, remained *in him* not determined: and if the donor or feoffor could not have limited

a future use upon the determination of the first, the donee or feoffee would have retained the possession without trust: and that would have been against the rules of equity, which is the guide of trusts and uses: then the principle upon which uses were founded, being, that the donee of an estate, accepting thereof upon a confidence, was bound in conscience *strictly* to pursue the directions of his donor, the operation upon the conscience of the donee was the same, whether the stipulation was to permit the donor to recall the estate back to himself at his pleasure, or for the donee to hold it in trust for others named in the original conveyance, or in trust for persons *at the future* appointment or nomination of the donor. These powers, therefore, were originally *mere* modifications of uses, taking effect, as directions to trustees which bound their conscience, and which they were compellable in a court of equity to perform. And this mode of conveyance was preferable to that by way of condition; because, if, in the latter case, the condition were to be broken, the heir only could take advantage of it, which would frustrate the intent of the feoffor; whereas, in the former case, a court of equity compelled a strict performance of the trust in
favor

favor of any person nominated by the donor to take the beneficial interest.

Now, though these powers, as modifications of uses, were acted upon by the 27 *Hen.* 8. for transferring uses into possession, and, by the operation of that statute, all that was equitable in them was transferred into a legal modification; yet that statute made no alteration as to the essential distinctions before mentioned between *use* and *possession*: this will be evident from considering the words and intent of the statute. The words thereof effected three things. First, they transferred the possession to the use, if they found a seisin to the use. Secondly, they transferred a possession in the *estate* of the use. Thirdly, they *blended* that possession with the quality, form, and condition, of the use. By these effects no alteration whatever was made in the limiting of an use, but *that* remained as it was before the statute. The intent of the statute was to remedy the mischiefs recited in the preamble, which were *frauds* and *wrongs* that fell upon the King and others by the disjunction of the use and the possession, and these are remedied as soon as the possession is added to the future use, as at present; for in both respects, cestui que use has the possession to

forfeit, charge, and incumber. No alteration *then* of the common law in the raising or limiting of present or future uses being made by the statute of 27 *Hen.* 8. but uses remaining, as to these points, different from possessions, as they were before the statute; they, being from their pliability so much more convenient for the purposes of society than conveyances at common law, came into general use and fashion; and these powers of revocation and appointment, of course, came into fashion likewise: for, after the statute, as before, the performance and execution of the power transferred the estate to the new uses, or re-vested the estate in him that created the power without any re-entry; which no common law conveyance could effect.

Powers when considered with relation to the donee thereof, may, in respect of their different operations, be esteemed as of two distinct kinds: namely, as restraining powers, or, as enabling powers.

The former power is, when the owner of an estate conveys it to trustees, reserving a power to himself to revoke, alter, enlarge or diminish the trusts declared therein; which power is reserved to be executed under

der particular circumstances *only*, and under certain *restrictions*. And it is called a *restraining* power ; because he who is owner of the land, and might alienate it by any mode of legal conveyance, does, by the instrument by which he conveys his estate to trusts subject to such power, confine himself not to alienate it by any other means, or under any other circumstances, than those, which by the terms of the power, he prescribes to himself.

In this sense, the power given to tenant in tail under the statute 27 *Hen. 8.* in *Mountjoy's* case, had it been restrained in *Infra.* point of duration to twenty-one years, (if the statute under which that settlement was made had been subsequent to that of 32 *Hen. 8.* which impowers tenant in tail to make leases) would have been a restraining power ; being a more narrow and confined power, than the statute of 32 *Hen. 8.* would have given him, as tenant in tail.

The latter powers have for their object, the conferring upon persons, not seised of the fee, the right of creating interests to take effect thereout, which could not be done by the particular tenant or donee of the power, unless by virtue of such dele-

gated authority. These, therefore, conferring the right of creating interests, to take effect out of estates which are not vested in the persons having power thereby to create such interests, are called enabling powers. And, in this view of the subject, a power reserved to a man as tenant for life in an estate *moving* from himself, but settled in strict settlement upon the consideration of marriage or other valuable consideration, is an enabling power; for those, who claim by virtue of such settlement, are, in contemplation of law, the owners of the estate, and the tenant for life is to be viewed merely as a particular tenant, exercising a power vested in him by the settlement, which is *only* valid *so far* as authorized thereby.

Hard. 415.

Enabling and restraining powers are either simply collateral and without an interest, or not simply collateral and with an interest.

15 H. 7. fol.
1. b.
1 Rep. 111.

Powers simply collateral, are, when a person is invested with the capacity of disposing of an interest in, or destroying of an interest in, uses and trusts, in which he hath not, nor ever had any estate. First, of creating such estate. As where cestui que use devised that his feoffees should sell his lands,

lands, and died : here the power to sell was *merely collateral* to the right of the land ; for the feoffees take thereby no interest in the land, but are *barely* impowered to sell. Secondly, of destroying such estate, as if there be a feoffment in fee by *A.* to divers uses. with *proviso*, that, if *B.* shall revoke them, the uses shall cease ; for *B.* has no interest in the estate, subjected to his power, nor can gain any by revoking or not revoking ; and, consequently, the person in whose favor he executes the power, or who *benefits* eventually by his execution of the power, takes not any thing from the donee of the power. Whatever interest accrues to him, is derived *solely* from the author of the power, and in no shape from him who executes it. 1 Rep. 174.

And such *mere collateral* powers may be either general or special.

General ; as where *D.*, possessed of a term for years during the life of *B.*, devised, that if *M.* should die, living *B.*, *then M.* should have power, before her death, to grant an annuity to *any person* she should nominate, and to charge the term therewith.

Gibbons et al. v. Moulton et al. Finch 346.

Special ; as where *A.* devised lands and tenements to his wife for life, and *then* to be at Dighton v. Tomlinson.

Comyns 194.
1 Salk. 239.
S. C. infra. et
vide Carter
232.

at her disposal, *provided* that she disposed of the same, after her death, *to any of her children*. These are, for distinction, called powers of specification.

Hard. 415.

Powers *not simply collateral* with an interest, are of two sorts ; namely, first, appendant or appurtenant ; secondly, in gross.

3 Salk. 276.
3. cites Sid.
107. not there
quære where.

Snape v.
Turton.
Sir W. Jones
392.

A power of the first sort is, where *tenant for life* has a power to make leases for one and twenty years, or three lives, or the like ; as where a power was given to a jointress, by her marriage settlement, to make leases for twenty-one years *in possession*. So if a man covenant to levy a fine to the use of himself for life, with remainder to his son in tail, remainder over ; with a proviso in the indenture, that, if he grant, bargain, or sell the land to another, or appoint other uses, it shall enure to such uses, and a fine be levied accordingly : this power likewise is *appurtenant* ; for these powers operate in the nature of emoluments to the estate of the donee thereof ; and are called appurtenant, because they are annexed to the estate of the donee, and, *when created*, are to be executed *out of*, and must be *concurrent with*, and have their being and continuance, *at least*

least for some part, *out of* the estate for life, or other estate of the donee.

Powers of the second sort, or powers in gross, are, when, though the power does not fall *within the estate or interest* of the person who is to execute it; yet, it is annexed in privity to it, and takes effect in the appointee, out of *an interest vested* in the appointer, to appoint at his option. Hard. 415.

Such power in gross may either be vested in a person, having *a particular estate* preceeding the power, but which the power is independant of: or may be reserved by the owner of the estate to himself, by way of power to take effect out of a settlement.

An instance of the first kind is, where a tenant for life of an estate, settled by a stranger, has power to make an estate, which is not to begin until after his own estate be determined; as a power to make a jointure, or limit a term to commence in possession after the death of the tenant for life. Edwards v. Slater. Hard. 410. S. C. infra.

An instance of the second sort is, where a man, seised in fee, or in tail, doth by fine settle his lands to the use of himself for life; reserving therein a power to create an estate by

by lease or otherwise, to commence after his death, for the raising money for younger childrens portions, or for securing a jointure.

And these powers are called *powers in gross*, because the estate or interest of the party, who is to execute them, *is not affected* thereby.

Digges's
Case.
1 Rep. 174.

Powers appendant, and in gross, are said to be, *not* simply collateral without interest; because, although the estates raised under such powers take effect *out of the estate* of the original creator *thereof*, yet the trustee of the power has an interest in the estate as well as in the exercise of the power; either, if it be a restraining power, as a power of revocation, to revest the estate in himself, &c. or if it be an enabling power, to transfer the estate; or to destroy such power by fine, feoffment or otherwise. Therefore the person to whom it is limited, is, in law, considered as coming in under him who executes the power; and, in such case, he who gives *operation to, and limits the use* is looked upon as the donor, and therefore his power is not considered as *merely collateral*, but favours and tastes, (as it is said, in the pithy language of antiquity,) of the estate and interest in the land.

Hard. 415.

And

And a power may be so circumstanced, with relation to the land upon which it is to operate, that, as to one estate therein it may take effect as a power in gross; and, as to another estate therein, as a power appendant; thus where lands were settled by *A.* to the use of himself for life, with power to make a jointure, and a lease for years, to commence after his death, for raising younger childrens fortunes, with remainder over in tail, reversion in fee in himself. Here, the power to make leases, is a power in *gross* as to the *remainder in tail*, *appendant* as to the *reversion in fee*.

Edwards v.
Slater.
Hard. 410.
infra.

Having premised thus much, upon the nature of powers in general, I shall now consider them.

I. With relation to the *person* from whom they originate, and *the instrument* out of which they arise.

II. With relation to the interests of persons by whom powers are to be executed *in the consequences* of the execution of them; and to the *civil qualifications* of the persons by whom they are to be executed.

III. With

III. With relation to the *means* by which they are to be executed.

IV. With relation to the *circumstances* required to attend the execution of powers, which will involve the consideration of the *nature* of the *act* to be effected by the execution of the power, and the *relative situations* of the donee and appointee under a power.

V. With relation to *some matters* peculiar to powers of *revocation*, and

VI. and lastly, With respect to such *general matters* concerning powers as do not *immediately fall* under either of the foregoing heads.

I. With respect to the *person from whom they originate* and the *instrument* by which they are created.

Sir Edward
Cleres's
Case.
6 Rep. 17. b.
2 Vez. 78.
2 Atk. 568.
Comyns
497.

All powers, as well those which are simply collateral as those which are not simply collateral, take effect out of the estate vested in the creator of the power; and their legal operation is by *authority* of the instrument which gives the power.

II. With

II. With relation to the interests of the persons by whom powers are to be executed, in the consequences of the execution, and the civil qualifications of the persons by whom they are to be executed.

In this view of powers, a material distinction has been taken between those simply collateral, and those not simply collateral. First, in respect of the influence of *the* acts of the person executing the power, over the power. Secondly, with regard to his *personal* qualifications to execute the power.

First. With regard to the influence of his acts over the power.

A simple collateral power conveying, as hath been said, *no interest whatever* to the *person* who is to execute it, mediately, or immediately, either in the estate *out* of which the power takes effect, or the estate *created* by *virtue* of the power, the law considers such person, as having *barely* a naked authority to do the act necessary to execute the power over another persons estate, and, therefore holds, that any alteration of the estate by such person, is, *quoad* the exercise

2 Vez. 79.

Hard. 415.
15 H. 7. fol.
1. b.
1 Rep. 111.
Digges's
Case.
1 Rep. 174.
S. C.
Moor 605.
5 Resolution.

cise of the authority vested in that person, *merely* void; therefore a feoffment or release made, or a fine levied, by such person, being trustee of the power, will not extinguish such simply collateral power.

2 Roll. Abr.
263 Pl. 2,
35, 40.

But powers not simply collateral, may be suspended, or extinguished, by the acts of the trustee thereof. Thus, if tenant for life, with a power appendant to revoke and limit new uses, make a lease *for life*; *that* suspends his power over the fee.

Hard. 415.
per Hale.

And such trustee of a power appendant may incumber his power. As if tenant for life, having a power to make leases for one and twenty years, or three lives, charge the land with a rent, and *then* execute his power, the charge will not be thereby defeated whilst he lives. So, if he had before covenanted to stand seized to the use of another during his life, because the power in that case is annexed to the estate.

But if such tenant, with a power appendant, make only a lease for a year; *that* neither suspends or extinguishes the power; nor is it considered as a charge upon it merely; but it operates as an execution,
in

in part. As if a feoffment be made to the use of *A.* for life, with divers remainders over; with power for *A.* to revoke the uses, and to limit new uses in fee, or in tail; and then *A.* bargain and sell the land to *B.* for a month, and, afterwards, grant the reversion in fee to *C.* and then *B.* attorn to the grant; this is a good revocation and limitation of new uses according to the power; for the making of the lease for years is not any suspension of the power as to the fee; for he may revoke for part; as he may limit an estate for years, and that will be good for the term; and, afterwards, he may limit it in fee to another, but that revokes not the lease for years before made; for, if it should, *he would then defeat that by his own act*, which the law will not suffer him to do: also the lease for a month and the grant of the reversion, being, in this case, one common assurance, shall be taken as an intire act.

Snappe v.
Turton.
2 Roll. Abr.
263. 2.
S. C.
W. Jones,
392. et Cro.
Car. 472.

And a power appendant, may be destroyed by the donee thereof, either by release, or by alteration of the estate to which it is annexed in *privity*, or, it may be defeazanced by a subsequent act. Thus where *A.* by deed indented, dated 1 *May*, 20 *Eliz.* infeoffed *B.* to the use of *A.* for life, and after to the use of *C.* in tail, remainder to

Albany's
Case.
1 Rep. 111.

the use of *D.* in tail, remainder to *E.* in fee; with a *proviso* that, if it should happen that *F.* should die without issue male of his body, it should be lawful for *A.* at all times at his pleasure, during his life, by deed indented, &c. to alter, change, determine, diminish, or amplify, any use or uses, intents, or purposes, limited or appointed in or by the said feoffment, or the use of any parcel of the premises. Afterwards, in the same month and year, *A.* made a feoffment of the said premises to *G.* in fee, and then, *April* 23 *Eliz.* *A.* by his deed did renounce, relinquish, and surrender, to *B. C. D.* and *E.* all such liberty, power, and authority of revocation, &c. which he had, after the death of *F.* without issue; and further did remise, release, and quit-claim to them, the said condition, proviso, covenant, and agreement; and all his power, liberty, and authority; and further granted to them and their heirs, that, for ever after, as well the said condition, proviso, covenant, and agreement, as the said power, liberty, and authority, should cease and be to all intents void. *F.* died 1 *May*, 23 *Eliz.* without issue; and afterwards *A.* by deed, made pursuant to the requisitions of the proviso, altered the uses of the former indenture, and limited new uses. And, upon this case, four questions were made.

made. First, Whether, such power of revocation to be executed in future, might be destroyed by feoffment. Secondly, If it might be released. Thirdly, Whether, if it had been reserved, (as such powers generally are,) to be executed in *præsenti*, it might have been released. Fourthly, Whether, such power might be defeazanced by an act of all the parties concerned in reserving it.

And first, it was contended, in support of the exercise of the power, that this power was *merely* collateral to the estate, and therefore could not be affected by a fine; and, consequently, not by a feoffment. Secondly, the power was compared to a condition precedent, and a diversity was taken between a condition precedent and a condition subsequent; for, it was admitted that a condition subsequent, (before the breach thereof,) might be released, for *there* the estate passed, and the condition was annexed to that which might be released. But, in the case of a condition precedent, there was but a *possibility*: as if *A.* granted to *B.* that, if *B.* did such an act, he should have an annuity of 20*l.* *per annum* during his life, and, before the performance of the

condition, *B.* released the annuity to *A.* the release was void; because the release could not extinguish a possibility. But, on the other side it was argued, that a fine, or feoffment, might utterly extinguish the power or authority, so as that, thereby, the feoffor disabled himself to execute it, when it came in *esse*. It was said, that the single question was, whether *A.* might limit new uses against his own feoffment? and it was contended that he could not. For, first, a livery was of such force, that it gave and excluded the feoffor *not only* from all present rights, but from all future rights and titles, as 9 *H. 7. fol. 1. b.* the case of tenant by curtesy, 9 *H. 7. 24. b.* the case of an intruder and recovery in a writ of disceit, and 39 *H. 6. 43. a.* where the son disseised the father and made a feoffment. And also in all actions, *although* the same were in a manner collateral to the land, as 34 *H. 6. 44. a.* the case of attainr, 38 *E. 3. 16. b.* the case of disceit. That, in those cases, those actions were extinguished by a feoffment of the land; and yet they were collateral to the right of the land; for by these no land was demanded, but they were only to reform erroneous proceedings, *viz.* the false oath and false return of the sheriffs, &c.

&c. but, because, by a mean, the possession and inheritance of the land would be also removed and divested by them, for that reason, by a feoffment of the land those actions were gone. So, in the case at bar, although this power to revoke the former uses and estates and to limit a new use, was not properly any interest or right in the land; yet, it was a mean by which the possession and right of the land would be altered and divested out of a third person. That it was clear, that a *future use* should be *given* inclusively in the livery; and, then, *if a future right* collateral to the right of the land; and a *future use*, should be *given* and *extinguished* in the *livery* of the land, so should it be in the case at the bar: for, to examine the case by parcels, suppose that, in the case above, the proviso had been only, that, if *A.* survived *B.*; then he might revoke the former uses without more being said, it was clear that, after the said feoffment, he could not revoke; for, then, he would have the land again, against his own feoffment, which would be against all reason. Then, in the case at bar, the proviso went further, *scil.* that he might alter, charge, &c. Suppose, then, that he had had power to revoke the

27 H. 8. 29.
b.
Delamer's
Case.
Plowd. Com.

ancient uses, and power to limit new uses to a stranger, how should the stranger have this new use? certainly by force of the first feoffment made by the said *A*; for, out of that, all the then existing and subsequent uses arose. And thus the stranger would have this use in a manner by the said *A*. against his own later feoffment and livery, which could not be. And, as to the cases of mere naked authorities, it was argued, that they were clearly distinguishable; for, in the case of naked authorities, the appointee was *in* by the instrument creating the power *simply*, but, in the case at bar, the appointee would be *in* by the act of him who executes the power also. And, upon conference with all the judges, *Wray*, (C. J. of *England*,) and all the Court of King's Bench, were of opinion upon this point, that a power, as well to revoke as to limit new uses, might be utterly gone and extinguished by a fine, or a feoffment.

And, as to the second and third points, it was contended, that such future power might be released; for it might be resembled to a condition subsequent, although the performance or breach thereof could not be done without an act precedent; as if *A*. enfeoffed *B*. and his heirs, upon condition, that, if *B*. survived *C*., if *then A*. and his heirs paid to *B*. his

B. his heirs or assigns 40 s. that, then, he and his heirs should re-enter; in that case, it was a condition subsequent; and, although it could not be performed but upon a contingency, yet the inheritance was in him, and should descend to his heir, and therefore might be released, and his heir by his release might be barred. And, therefore, if a man made a feoffment in fee with warranty, in that case, before he could vouch, he ought to be impleaded; so that the voucher depended upon an act uncertain, *viz.* that he should be impleaded in a real action by a stranger; yet, by a release of all demands, the warranty was extinguished; for it is an inheritance in law, and may descend to the heir, and, consequently, may be released. And, if a man covenanted to do a collateral act, in that case, before the breach of it, a release of all actions, suits, and quarrels, would be nothing worth; for, before the breach of it, there was not any duty, or cause of action; but the breach ought to precede as was adjudged. But, in the same case, a release of all covenants would bar it: for, by his death, the law transferred it to his executor, and, by consequence, he might release it; so, when a woman had title of dower of land, whereof one was tenant for life, the reversion to another in fee, and

Litt. 172:

Tr. 4 Eliz.
Rott.
1027 Com.
Ban.35 H. 8. 56,
57.
Dyer.16 E. 3 Fitz.
Bar. 145.

21 H. 7. 41.
2.

the woman released to him in reversion; it was a good bar in a writ of dower against tenant for life; and, yet, at the same time, she had no present cause of action against him, but, *in futuro*, after the death of tenant for life. So, a release of an annuity to the patron in time of vacation was good, yet no action lay against him nor against any other till a successor were made, and yet a release would extinguish it. And suppose that, in the case at bar, the power of revocation upon the said contingency had been reserved to the feoffor and his heirs, without doubt, it would have been an inheritance in him, and would have descended, to his heir, and by consequence his release would extinguish it.

But, as to that point, the court gave no resolution. But, upon the third point, it was agreed, *per totam curiam*, that, if the power of revocation had been *in presenti*, as the usual provisos of revocation were, it might have been extinguished by release, *made by him who had such power*, to any who had an estate of freehold in the land in possession, reversion or remainder; and thereby, the estates, which were before defeasible by the proviso, would, by such release, be made absolute.

And,

And; as to the fourth point, it was contended against the execution of the power, that, as well the power as the proviso and covenant, might, by the words of defeazance, be defeated; for, both were executory, *scil.* the power itself which was created by the covenant, and the proviso; and, as the proviso and the covenant itself commenced by *deed*, so, by *deed*, they might be annulled and defeated. For, it was said that, in all cases when any thing executory was created by deed, the same thing, by consent of all persons who were parties to the creation of it, might, by their deed, be defeated and annulled; and therefore, it was said, that warranties, recognizances, rents, charges, annuities, covenants, leases for years, uses at common law, and the like, might, by a defeazance made with the mutual consent of all those who were parties to the creation of them, be, by deed, annulled, discharged, and defeated; for, it would be strange and unreasonable that a thing, which was created by the act of the parties, should not, by their act, with their mutual consent, be dissolved again. And of such opinion also was *Wray*, Chief Justice, and the whole court; namely, that by the said defeazance, as well the said covenant which created the said power,

power, as the power itself created thereby, was utterly defeated and annulled.

Digges's
Case,
1 Rep. 174.
Et vid. Her-
ring v.
Browne,
infra.

And it was clearly held, in the fourth resolution in *Digges's* case, that a fine levied by tenant in tail, before a power of revocation had been *completely* executed pursuant to the forms required in the creation of it, extinguished the power.

Hard. 416.
1 Vent. 226.

An assignment of *totum statum suum*, or total alteration of the estate for life to which a power is appendant, destroys the power.

Infra 28.

But, where a feoffment was made of lands subject to a power by one to whom the power was not reserved and in whom it never vested, it was said by Lord *Hale*, in *Edwards* vers. *Slater*, that such feoffment would not destroy the power. However it seems that, in that case, which arose upon a special verdict, there was no feoffment found, but only a conveyance with the words, *grant, bargain, sell, release, enfeoff, and confirm. So quære.*

Jenkins v.
Keymis.

But a lease and release, not taking effect so as to displace an estate, will not destroy a power appendant. Thus, where one, being tenant for life and having a power by deed

or will to charge land with 2000 l. as he should think fit, joined with the remainder man in tail, in a lease and release to convey the premises in fee by way of mortgage for securing a sum of money and interest; it being held that this mortgage was not a good execution of the power, it was then contended, that tenant for life had conveyed all his interest out of him thereby, and so was disabled to execute his power afterwards. But the court were of opinion, that the power was not destroyed by the mortgage; because it was by lease and release, and not by fine or feoffment,

1 Ch. Ca.
103.
et vide Edwards v.
Slater *infra*,
28,

And a power in gross as well as a power appendant, may be destroyed by the donee thereof, by fine or recovery.

Thus, it was agreed by the court, in the case of *King vers. Melling*, that a common recovery suffered by tenant for life of an estate with a power annexed thereto to make a jointure, would bar the power; for, that the recompence in value was of so strong consideration, that it served as well to bar rents, conditions, powers, possibilities, &c. going out of or depending upon the land, as the land itself.

King v. Melling.
1 Vent. 228,

BUT

But, in the following case, a distinction was made between powers in gross, and powers appendant, as to their being affected by the act of the donee thereof. And it was held, that where a power with relation to the land on which it was to operate, affected it, as to part of the estate or interest therein, as a power in gross, and, as to part of the estate or interest therein, as a power appendant, the act of the donee of the power was valid, *quoad* that part of the interest or estate which it affected as a power appendant, and void, as to that part of the interest or estate which it affected as a power in gross.

Edwards v.
Slater.
Hard. 410.

There, a man settled lands, by fine, to the use of himself for life, with a clause in the deed of uses, "*That if he should make a jointure to his wife, and should make a lease for 31 years, to commence after his death, for the raising of three thousand pounds for his daughters portions, that then the conuzees should stand charged to those uses; and then limited several remainders over in tail, the reversion in fee to himself.*" He afterwards made a jointure pursuant to this power, and then he bargained and sold the lands to other persons in fee by deed inrolled,

rolled, in trust to raise portions, &c. The bargainees afterwards re-conveyed the lands to him in fee by *feoffment*. Then he made a lease for 31 years to begin after his death, for the raising three thousand pounds for the portion of two of his daughters, and *then* he and his wife levied a fine, *sur conuzance de droit*, &c. and afterwards he died. A person, by direction of the lessee for 31 years, entered. And, whether his entry was lawful or not, was the question? And this depended upon whether the power was extinguished by the bargain and sale, and feoffment. And, amongst other arguments, the following of which only were relevant to this point, it was contended for the plaintiff, that by the bargain and sale, the tenant for life had departed with all his estate, so that, afterwards, he had no power to make a lease for 31 years; for, the power, in this case, arose and passed out of the interest and estate of the tenant for life. Secondly, that, by the re-conveyance to the tenant for life *in fee*, he was *now in* of a new and other estate, and, consequently, his power was lost and gone. But *Hale*, Chief Baron, and Baron *Rainesford* held, against the opinion of Baron *Turner*, that neither of the circumstances stated, had destroyed the power: and *Hale*, as to the first objection said, that
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Vid. *supra*
26.

Vid. *supra*
26.

Hughes Rep.
27, 28.
et vid. Cro.
Eliz. 688,
689.

the bargain and sale did not touch the remainders in tail, but only the estate for life and the remainder in fee; for the power, *as to that*, was not a power annexed to the land, but a power in gross. If the tenant for life, in this case, had had a power of revocation, and had made a lease, that would not have destroyed his power; because no estate was displaced by it. And his lordship said, that a bargain and sale did not pass away or affect a contingent use in the bargainor; but a feoffment or a fine would transfer it. And, as to the second objection, *Hale* held, that if the remainder in fee should come in being, the *bargainee* would *not* hold the land *charged* with this lease for 31 years; because the interest in the remainder in fee would support the bargain and sale, and it was a power *annexed* to that estate: but, *till then*, it was a collateral power and in gross, *quoad* the remainders in tail which were precedent to it.

But, from what Lord *Hale* observes in the preceding case, as to the distinction between a bargain and sale, and a feoffment, he seems to have rested his determination in this case, partly, upon the same distinction as was taken with regard to the lease and release in the case of *Jenkins v. Keymis*; namely, that, being by
bargain

bargain and sale, there was no actual transmutation of possession, and so no estate displaced by it : and he seems to have held the conveyance of the bargainees as not altering the case. This is the only view in which this case seems reconcilable with the resolution in *King v. Melling*. Supra 27.

If one, who hath power to revoke an use, make a lease for years, and then levy a fine for assurance of the lessee, without any other express use ; such fine will not extinguish the power of revocation, but will suspend it for the term. Bullock v. Thorne.
Moore 615.

Secondly, with regard to the civil qualifications of the person to execute the power.

And, as to this, it is observable, that where the power is simply collateral to the estate, a *feme covert* may execute it, notwithstanding, that at the time it was delegated to her, she was sole ; for, whenever she executes the power, the *cestui que use* of the power does not derive any interest from the donee of the power, (the donee thereof being merely an instrument, or conduit-pipe to carry into execution the intent of the donor of the power,) but is in *immediately* by and under the instrument,

I MEAT,

Daniel vers.
Ubley.
W. Jones
137.
Noy. 80.
Latch 11. 39.
135.

ment, creating the power, not affected by any intervening acts of such donee. As where *A.* seised of a messuage in fee, devised it in these words. "I give and bequeath unto *Agnes* my wife, my house, &c. to dispose at her will and pleasure, and to give to *such* of my *sons* as she thinks best." The devisor left four sons. The wife married a second husband, and then she executed, the power vested in her, by feoffment to the second son of the devisor. And, on an ejectment brought on an eviction of the second, by the eldest son, the question was, if the feoffment were good; the wife having married after the death of the testator and before she executed the power? and the court agreed unanimously as to that point, that the act of the wife was good notwithstanding the coverture.

Dighton v.
Tomlinson.
Comyns 194.
S. C.
Salk, 239.
Lucas 31, 71.
Vide 1 Will.
154. his ar-
gument in
S. C. et vid.
Gibbons v.
Moulton.
Finch 346.

So where *T.* by his will, devised all the rest of his freehold lands and tenements to his wife *M.* for life, and *then* to be at her disposal, *provided* that she disposed of the same *after her death* to any of her *children*. Afterwards the wife, the devisor being dead and she having issue by him a son and a daughter, married again; then she and her husband executed the power in favor of her daughter;

daughter; and two questions arose. First, what was given to *M.* the wife, by the will; whether a naked power or an estate? Secondly, if a power *only*, whether her coverture rendered her incapable of executing it? As to the first question, the court were unanimously of opinion that the wife had, under the will, an estate for life *only* with a power of *specification* simply collateral. And upon the second question, three of the judges held, that the power was well executed notwithstanding the coverture. Upon what ground the fourth judge differed in opinion does not appear, but the decision was affirmed in the *Queen's Bench* upon a writ of error.

3 Leon 71.
Pl. 108. et
Lief v.
Satting-
stone.
1 Mod.
Rep. 189.

And if a power be appendant or in gross, and the donee thereof be a feme sole, the better opinion seems to be, that she will not, by her subsequent marriage, render herself incapable of executing the power. She being, as to her interest therein, considered, in equity, as a feme sole.

Thus, it was resolved between *Harris v. Graham* on a special verdict, where a man devised land to *B.* his wife for life, the remainder to *C.* in fee; and then, by codicil, devised that *B.* should have power, *fix months*

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Harris v.
Graham.
1 Roll. Abr.
329. 12.
S. C. 2. *ibid.*
247. 6.

before her death, by deed or without, to lease for six years; and the husband died, and *B.* married again; that *she* and *her husband* might lease, by deed or without deed, for six years.

Herle v.
Greenbank.
3 Atk. 712.
S. C. infra,
43.

So, it is said by Lord *Hardwicke* in the case of *Herle v. Greenbank*, that it had been determined in the case of *Lady Travel*, before Lord Chancellor *King*, that a feme covert might exercise a power of *appointment* of her own estate; and so his Lordship said was the common case where a power was given to a woman, tenant for life, to execute leases.

Bayley v.
Warburton.
Com. 494.

Again, where one seized in fee, on his marriage with a second wife, settled the lands in question on himself for life, then to his wife for life, then to the issue of that marriage, then to the use of his eldest daughter by his former wife, who was married, and to the heirs of her body, &c. And there was a proviso, that it should be lawful for the wife, *during her life*, to demise the premises to any person for such term, with and under such conditions, rents, and reservations, in such manner to all intents as tenant in tail might do by the statute 32 *Hen. 8.* for the term of one, two, or three lives, upon, and under, such reservations

vations and rents, and in such manner, as
 tenant in tail was enabled to do by that
 statute. The husband died, and the wife
 married again, and *then* she and her hus-
 band demised the premises pursuant to the
 power. And two questions material to the
 point in discussion arose. First, whether the
 lease being made by husband and wife, when
 the power was given to her alone were a
 good execution thereof, or whether it were
 not suspended by the marriage? Secondly,
 whether this lease by the husband and wife
 ought not to have been made by fine? and
 it was held upon the first question that this
 was a good execution notwithstanding the
 coverture. And, as to the second, that no
 fine was necessary; for the estate of the
 lessees was not derived from the lessors, but
 arose out of the estate of the feoffees or
 releasees named in the original settlement.
 And that therefore, nothing more was re-
 quisite to the raising an estate to the lessee,
 but what was required by the deed which
 created the power; which was only an in-
 denture signed by the party making the
 lease, and made in such manner as the 22
Hen. 8. required in leases by tenant in tail.

The case of *Rich* vers. *Beaumont*, was
 cited in that of *Herle* vers. *Greenbank* to the

Rich vers.
 Beaumont.
 3 Brown's Ca.
 Parl. 308.
 Vin. vol. 4.
 p. 168. C. 3.
 26. vol. 22.
 p. 277. Ca.
 47.
 2 Eq. Ca.
 Abr. 157.
 Ca. 4. 753.
 Ca. 2.

same point ; but this case seems not to have met a legal decision in the ultimate stage of it. The facts material were, that *G. B.* daughter and heir of *W.* (seised in fee tail of estates in possession, and also of estates in reversion after the death of her mother *E. B.*) by indentures of lease and release conveyed the same to trustees, in order to suffer a recovery thereof ; the uses of which, were thereby declared to enure (after securing an annuity to *E. B.* during her life) to trustees, upon trust to permit and suffer *G. B.* and her assigns, during the term of 99 years, if she should so long live, to receive and take the rents and profits of the premises to and for her sole and separate use and benefit, whether she should be sole or married, and exclusive of any husband or husbands she might at any time thereafter marry ; and, upon further trust, that if *G. B.* should leave issue, either a son or sons, daughter or daughters, or both, that should survive her, or that the issue of such son or sons, daughter or daughters should survive her ; then the trustees, &c. should, upon request, and, at the direction of the said *G. B.* testified under her hand and seal, by any deed in writing, or by her last will and testament in writing, or any instrument, purporting to be her last will, signed in the presence of
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three or more credible witnesses, grant and convey the premises, subject to the said yearly rent charge to *E. C.* to and amongst such child or children as she should leave, or to the issue of such child or children if they should die before the mother, to and for such estates and uses, and in such manner and proportion, as by such writing, will, or instrument, should be directed and appointed; and for want of such direction and appointment, should grant and convey the said premises to and amongst such child or children of the said *G. B.* as she should leave at her decease; or in case of the death of such child or children before her, then to the issue of such child or children equally to be divided amongst them, as tenants in common and not as jointenants. And upon further trust, that in case *G. B.* should leave no issue of her body, and that the said *E. C.* her mother should survive her, then the trustees, &c. should, upon request and at the charge of the said *E. C.*, grant and convey the said premises to her and her heirs: and upon further trust, that in case *E. C.*, should not survive the said *G. B.*, then the trustees, &c. should, upon request and at the charge of the said *G. B.*, grant and convey the premises to her and her heirs; or to such other

use or uses, person or persons, and for such estate or estates as she should, by any instrument in writing under her hand and seal, attested by two or more credible witnesses, or by her last will and testament in writing duly executed, or other instrument purporting to be her last will and testament, direct and appoint; and, for want of such appointment, then to convey the same to such person and persons and their heirs, as for the time being should be heir at law of the said G. B. And in the same deed was contained a proviso that, “ *in case the said G. B. should survive the said E. C., it should be lawful for her, by deed indented under her hand and seal, executed in the presence of three or more credible witnesses, or, by her last will and testament in writing duly executed, to revoke, alter, change, determine, and make void all or any the use or uses, estate or estates, therein before limited, declared or appointed, of and concerning the said premises; and by the same, or any other deed, or will, to create or raise, limit or appoint any other new use or uses, estate or estates, of and concerning the same, or any part thereof.*”

G. B. at the time of executing these deeds, declared she was going to be married to A. R. and that she intended the estate for the
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the advancement of him and his family; and the deeds were accordingly executed with a view and intention of vesting a power in her for that end and purpose.

The marriage was soon afterwards had, and *E. C.* died in the life time of *G. B.*

A. R. and *G. B.* had issue only one son; and she, *having*, as she frequently declared, *a settled intention to advance A. R. and his family, by virtue and in pursuance of the powers reserved to and vested in her by the settlement, but without having any opportunity of seeing the same, made, signed, and sealed her last will and testament, attested by three credible witnesses; and, thereby, devised to her son all her real estate in the county of Derby, he to enter into possession thereof in the manner in the will stated: and, "if her son should die in his minority without issue, then she devised all her real estate to A. R. his heirs, and assigns for ever."* And she ordered and directed that her trustees, or such of them as should be living, should convey their said trust estate to such uses, and for such persons as were named in her said last will. The testatrix on the same day died, and soon afterwards her son died, an infant and without issue.

A. R. then exhibited a bill in Chancery against the heirs at law of his wife *G. B.* and against the trustees, praying that the trustees might convey the legal estate in the premises to him and his heirs; the defendants having put in their answers, the cause came to a hearing before Lord Chancellor *King*, who dismissed the bill; declaring, that if *A. R.* had any title to the premises in question, his remedy was proper at law and not in equity.

A. R. appealed from this decree. And thereupon it was contended on this head of objection, that if the power existed, it was not well executed; for, when a power was reserved to revoke by a last will duly executed, it must mean a legal will, one that was to be made under those circumstances, and with such qualifications as the law required; but the will of a feme covert of lands was by law absolutely void. That there was no necessity of understanding the will mentioned in the power, in any sense different from the legal one, so as to mean any declaration of her last will and intent, though during coverture; because she was unmarried at the time of creating the power, and might then have executed it according
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to law ; her marriage was a suspension only of the power during coverture, and upon surviving her husband, if that contingency had happened, she might again have executed it. If the will was a good revocation, the uses, limited to the trustees, were revoked ; and consequently, their legal estate was taken away and vested in the appellant, and then there was no foundation for his applying to a court of equity to have a conveyance from the trustees. But whether the revocation in point of law was good, or not, was a question merely at law, when the appellant might have the full benefit of his right if he had any ; and if there should be any legal defect in the execution of the power, a court of equity would never make it good in favor of a volunteer against a disinherited heir. But the order of dismissal complained of was reversed, and it was ordered that the Court of Chancery should direct a case to be stated between the parties, and to be sent to the Judges of the Court of King's Bench, for their opinion on the following points, viz. " Whether the will, or instrument purporting to be the will of G. R., formerly G. B. the appellant's late wife, were a good appointment of the estates therein contained ; and whether the trusts therein
limited

Et vid. *Burnet v. Mann.*
et *Vez.*
157.
S. C., *infra.*

limited were uses executed or trusts?" But Mr. *Brown* in a note in his compilation of Cases in the House of Lords, observes, that, after a very laborious search, he had not been able to discover a simple trace of any further proceeding in this cause, except an order in the Court of Chancery directing the case to be settled by a master, in case the parties differed in stating it; however, in truth, the directions in this case involved in them the decision of the question respecting the validity of the appointment by the wife: for, if the House of Lords had been of opinion, that a feme covert could not execute such a power, that would have put an end to the question, as to the husband's right to the estate.

Marquis of
Antrim v.
Duke of
Buckingham.
1 Ch. Ca. 17.
S. C. 1 Sid.
101.
1 Eq. Ca.
Abr. 343, 4.
3 Salk. 276.

But if such power be *expressly* reserved to be executed by the feme "*being sole*," a subsequent marriage will suspend the operation of the power. As, where *A.*, being a feme sole, and seised of a reversion in lands after one life, settled the same to the use of herself for life, remainder in tail, with power to her "*being sole*," to make leases for three lives in possession. She married, and afterwards she and her husband made leases for one and twenty years for payment of debts, as was alledged. One question was, whether this
4 lease

lease by baron and feme was good? *Et per curiam*. The power was not pursued; for by the marriage she had put herself in the power of her husband, and it was the deed of the husband and not hers.

But the circumstance, of the power being expressed to be executed by the wife, “*being sole*,” is not mentioned in *Siderfin*.

But a distinction is taken in the cases of powers to be executed by infants, between powers simply collateral, and those where there is an interest; for an infant may do a ministerial act if he be, therein, a mere instrument or conduit-pipe, and his interest be not concerned; but a power over *his* own inheritance cannot be executed by an infant.

Thus where *A.*, having an only daughter about sixteen or seventeen years of age that had married clandestinely to *B.* who soon afterwards became a bankrupt, made his will, and thereby among other things devised all his freehold, copyhold, and real estate, whatsoever and wheresoever, and all his leasehold estate to trustees, their heirs, executors, administrators, and assigns in trust, to apply the residue, after paying their own charges,

Herle v.
Greenbank.
1 Vez. 298.
S. C. 3 Atk.
696.

charges, to the sole and proper use of his daughter, during her life, and to be at her disposal, and not subject to the debts or controul of her husband, her receipts to be good, and to permit her by deed or writing, executed in presence of three or more witnesses, notwithstanding her coverture, to give and dispose of all his freehold, copyhold, and leasehold estate, as she should think fit; she having a particular regard to his poor relations in *Cornwal*; and gave to the same trustees, whom he made joint executors, his personal estate in trust for the sole and separate use of his daughter, and to be at her disposal, and not subject to the debts or controul of her husband. *A.* died soon afterwards. His daughter being under the age of twenty-one, though above seventeen, after her husband's bankruptcy, and living separate from him, made her will, and thereby in pursuance of the power given her by her father's will, bequeathed to her daughter *M.* one hundred pounds *per annum*, until she attained the age of ten, and after that one hundred and fifty pounds *per annum* until twenty-one: and gave her 8000 *l.* to be paid her when she attained twenty-one, but if she died before twenty-one, without heirs of her body, then she devised the 8000 *l.* over. She then gave legacies
to

to some poor relations; appointed the two trustees in her father's will, and two others, joint executors, guardians and trustees to her daughter: then devised the residue of her real and personal estate to the plaintiffs, their heirs, executors, and administrators for ever, as tenants in common, not as jointenants, charged as aforesaid.

And one question was, whether the will of the daughter was a good execution of the power in her father's will as to the real estate?

For the plaintiff it was contended in support of the power, that, as to the devising the estate, it depended on two questions. First, whether it was the intent of the testator that the devisee should have this power during her infancy? Secondly, if he intended it, and so expressed it, whether in law or equity it could have effect? To this end, the circumstances at making the will were proper to be considered: the testator had a point in view, which could not be answered but by giving his daughter power to receive the profits immediately after his death, and then it must be to dispose of it also; the object being to keep every thing out of the husband's power, nor was there
any

Moore 512.

any thing to prevent this intent from taking place. An infant might present to a church; might declare the uses of a fine and recovery; might by custom at a certain age make a conveyance, and the law would ingraft upon such custom and carry it further, as appeared from the case put by *Moore* in Lord *Buckhurst's* case, of an infant's having power to make a feoffment by custom, and making a feoffment to the uses of his will, and said that *that*, though void as a will because of his infancy, should serve as a declaration of the use of the feoffment; that this was not to be distinguished from the present case. If indeed this did not operate by way of execution of a power, but as disposing of her interest, it would not be good: but it operated by the power, as she recited it; and the rule of law was, that, when there were two ways of doing the same thing, if it could not be done by one, it should by the other. It had been determined in *Rich*

Vid. sup. 36.

v. Beaumont, that a feme covert might execute such a power; then why might not an infant at the age of discretion? the disability of an infant was not a natural disability, because it was by a positive law; and then the same rule of justice affecting one positive disability would affect another, and the disability of a feme covert was stronger than
that

that of infancy; for to an action upon a bond, a feme covert might plead, *non est factum*; an infant must plead infancy, *et sic non est factum*. If it was asked at what age an infant might do this? the answer was, whenever he was capable of doing it. In this case there was no doubt or nicety; the infant being about nineteen; having as much discretion as if she had lived two years longer; and the Court of Chancery would judge of the personal discretion of the infant. But one *non compos* could not execute any power, as to act as an attorney, &c. because he had no mind. Where an infant acted in *auter droit*, he was capable of acting, not hurting himself; it being the fault of the party trusting him; so that an infant executor might sell under a power by the will.

But Lord *Hardwicke*, after full consideration of the question, was clearly of opinion, that the power as to the real estate was not well executed; his Lordship, in delivering his judgment, said, that this was a considerable question, and never determined that he knew of. He could find no case, where a power given generally, could be executed by an infant: and therefore he would make none. As to the general question concerning

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ing powers, it must be admitted there were some kind of powers an infant might execute : as where he was a mere instrument or conduit-pipe, where no prudence or discretion was required, or where his right was not affected. “ Few persons were disabled from being private attornies to deliver seisin ; for monks, infants, feme coverts, &c. might be attornies.” As this opinion of Lord *Coke* was delivered, it seemed, at first, as if he meant only to deliver seisin, which was merely a ministerial act, although the words were general. Yet Lord *Coke* said, that an infant could not be an attorney : it was therefore pretty much undetermined, how far infants could be attornies, unless to deliver seisin, or such a ministerial act. But that was different from these kind of powers. These powers over real estates were introduced by the statute of uses ; for, before that statute they were done by way of condition ; and as before that statute a man might exercise a power over an use, so he might still. At common law an infant might have performed a condition, that was a condition for his benefit : so he might make a feoffment for his benefit : as if he had an estate, upon condition to make a feoffment of part of it to *I. S.* or else to lose the whole estate. But, as to the other kind of powers

to be executed by infants, he found no authority for it. An infant might undoubtedly present to a church, but he could not execute this power in like manner: he might present by guardian, if only a month old; and the strong ground of that was, that there was no inconvenience, because the bishop was to judge of the clerk's ability. The instances of fine and recovery were to be laid out of the case, the law allowing infants to declare the uses thereon for want of remedy; for, in the case of an infant's fine, during nonage, if error was brought, and tried by inspection, it might be reversed; but, if not reversed, the fine stood: And if the fine stood, the declaration of the uses was the same conveyance, and therefore that would stand; for, on matter of record, he was taken to be a person of full age, and none must be admitted to aver the contrary. No argument could be drawn from custom, custom differing from private powers given in general: custom was *lex loci*, and was always presumed to have a reasonable commencement: and such a custom, that an infant at fifteen might make a feoffment, was the same, as if a private act of parliament had been made to give infants such a power. The case put by *Moore* had a semblance to the execution of a power, but was

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put

put only *arguendo* at the bar; he cited no case for it, nor could his lordship find any authority to support it, the cases being rather to the contrary, as 21 E. 4. b. *Bro. Custom. pl. 50. 2 Rol. Ab. 779.* that, if an infant made a feoffment of gavelkind lands warranted by the custom, and it was to his own use, if he made a will of the use, it was void; unless the custom would warrant it, the devise was not good, for the custom must be taken strictly. And, in his apprehension, this differed little from the case put by *Moore*; for, before the statute of uses, one might devise the use, and the will would have been a good direction of the use. If so that one, who had a feoffment to his own use, might devise it, yet, according to the case in *Roll. Abr.*, the use there could not be devised by will; which was a direct contradiction to the case put by *Moore*, *arguendo*; and therefore he took that case not to be law. It was said that a feme covert might execute a power, (which was so determined in *Rich v Beaumont*, upon the execution of a power created before she was covert, and also in a case before Lord King) so a power to a feme covert to make leases was good, and therefore why not *this* to an infant of the age of discretion. He took it, in law, that the disability of an infant with respect to his
real

Vid. supra.

real estate was more favored, and a stronger disability than that of feme covert. In *Hob.* 95. there were some cases put, and there was a marginal note very material. And here he would take notice, that the notes in *Hob.* were allowed to be his own. The note was this; "coverture was not, at common law, so far protected as infancy, and some other disabilities, as non sane memory, &c." the ground of the disability being, not from want of judgment, but from being under the power of the husband; she having as much judgment as if discover: this was the reason why she was examined upon suffering a recovery. But, no examination of an infant would make his recovery good, his disability arising from want of judgment. His lordship would mention some other cases; viz. a woman disseisee married, disseisor died seized: that would take away her entry after her husband's death, unless she was within age at the time of her marriage, for, then, no folly could be accounted in her in taking such husband as would not enter before the descent. This shewed, that the disability of an infant arose from want of judgment. In 10 Co. 43. *a. Mary Portington's* case, a common recovery against husband and wife was held good; but not so against

1 Inst. 246.
403.

an infant, who had not such a disposing power of the land as they had, but was *tout ousterment* disabled, by law, to convey or transfer his inheritance or freehold during minority : but she was said here to be of as much discretion, as if she had lived two years longer, and it was urged that the court would judge of the infant's personal discretion : This would be introductive of the utmost inconvenience, and a power with which he should be very sorry to be trusted. There was a variety of opinions of peoples ability and judgment : and, in these cases, neither of them could be known until after the death of the party. The words of *Hubbard* 225, as to a feoffment of an infant by custom, were material, *viz.* that, in pleading, an age certain must be set down and not left to the measuring a yard of cloth, &c. These general cases determined him in his opinion, that this execution could not be good. Private acts of parliament had been made to enable infants to execute powers, as in *Sir Thomas Perkin's* case. His lordship had searched, and the only case he could find of a power executed by an infant was *Lord Kilmurry v. D. Gery*, (generally cited for another purpose) which was cited, and more particularly stated in *Evelyn v. Evelyn*, 2 *Wms.* 659. He had sent for the decree, and it did look there as if

if it had been a power executed by an infant, but it was by virtue of a private act of parliament: he sent for that act of parliament, and there was an express clause in it to make good all acts to be done by the infant, relating to the settlement by that act; which were, notwithstanding his minority, to be as valid and effectual, as if at the time of making he had been of full age. So that *that* was the case of a power clearly arising from an act of parliament, and no colour of an authority for a general power. Taking it therefore in *general* he was of opinion that an infant could not execute a power.

But next it was to be considered, whether any thing in this case was particularly to this purpose? and he thought there was. First, upon the penning of the power: Secondly, as it was a power coupled with an interest: and upon the penning there was a strong objection against her executing it during infancy; for, the testator, having the coverture in view, had excluded that, giving her power to dispose, notwithstanding *that*; and would also have excluded the case of infancy, had he *so* intended: and then the rule was *expressio unius exclusio alterius*. He might not think there was any occasion for giving her power during infancy, as she

was then about nineteen ; his plain view being to secure it from the husband's power, and that he might not induce or cajole her to part with it : Secondly, this was a power coupled with an interest, which was always considered different from naked powers. It was admitted that, if this execution was to operate on the estate of the infant, it might not be good ; now it was clearly so to do ; for, she had the trust in equity for life, with the trust of the inheritance in her in the mean time, which would remain in herself, if not disposed of, and descend to her daughter ; so that this was directly a power over her own inheritance, which could not be executed by an infant.

1 Vex. 303.

But, as to the personal estate, which was likewise given to the separate use of the daughter, it was said, in the last case, to be a rule of the court, that a feme covert might dispose of that, and that *that* was clear of the objection made as to the real estate ; because she was above the age of seventeen, at which age, if sole, she might have made a will thereof.

III. With relation to the means by which powers are to be executed.

Under

Under this head we must consider, first, the power as with respect to the instrument by which it is to be executed.

Secondly, with respect to the form of that instrument.

First, if provision be not made expressly, as to the nature of the instrument by which the power is to be executed, it may be done either by deed, or by will, at the election of the donee.

Thus, where *T.*, being seised in fee, devised to *M.* his wife all the rest of his freehold lands and tenements in *York* for life, and “*then*” to be at her disposal, provided that she disposed of the same *after her death* to any of her children. After the testator’s death, the wife, having issue a son and a daughter, married again, and she and her husband, by lease and release, conveyed the lands to the use of herself for life without impeachment of waste, after her death to her daughter in tail, and for want of such issue to her son and his heirs, with a power of revocation. And one question on the execution of this power was, whether it were good, being by way of lease and release? and it was contended against the execution

Dighton v.
Tomlinson,
Com. 194.
S. C. Salk.
239.
1 Will. 149,
supra 32.

of the power, that this disposition by *M.* should have been "*by will*," and not by deed; the devise being to her for life, and "*then*" to be at her disposal: But, it was answered, that the law did not require any precise conveyance for the execution of a power; for, that a bare appointment was sufficient. And that certainly such construction should be made as might be agreeable to the nature of the case; she could not make the disposition *after her death*; and if she did it in her life, why might she not do it by an act executed, as well as by will? It had been said that a will was revocable; but, here, she had added a clause of revocation which answered all the purpose of a will. That the word, "*then*," signified, only, *when* this appointment was intended to take effect in possession; and that so it was held in *Boraston's case*, 3 Co. where it was adjudged, that the adverbs "*when*" and "*then*," in cases of limitation of estates, do not make any thing necessary to precede the settling of them, any more than, when *one* lets land for life and *after* lessee's death, "*then*" the remainder to *J. S.*, in which case the remainder vested presently.

And, as to this point, three judges of the Common Pleas were of opinion, that the
power

power was well executed : which judgment was *unanimously* affirmed by the court of King's Bench on a writ of error ; Lord C. J. *Parker* delivering *it*, as the opinion of the court, that this conveyance by *lease* and *release* was an "*effectual*," though *improper* execution of the power.

So where *A.*, seised of lands in fee, devised them to his wife for life, and "*after her death*," she to give them "*to whom*" she would ; he had issue two daughters, and then died. The wife granted the reversion to a stranger and committed waste. The daughters brought an action of waste ; and whether the action was maintainable or not, depended upon the wife's right to *grant* the reversion in *her life-time*. And though, from the words "*after her death*," it might well have been intended that the testator meant to empower his wife to give the reversion by *will*, yet it was adjudged, that she might *grant away* the reversion in *her life-time*.

Anony.
3 Leon. 71

And though the style of directing the mode of executing a power be by words, which, *in their ordinary import*, must be understood to mean a deed ; yet the execution will be good, although it be by will.

Thus,

Kebbett v.
Lee,
Hob. 312.

Thus, where *L.* covenanted to stand seised of the lands in question, to the use of himself for life, and after his decease to the use of *G. L.* his son and heir and the heirs of his body, remainder to his own right heirs: provided nevertheless that, if the father should, at any time during his life, be minded, upon any occasion, to make void or change the uses, that then it should be lawful for him, being in perfect health and memory, by writing under his hand and seal, and, by him, delivered in the presence of three credible witnesses, to declare that his will and pleasure was, that the said uses, or any of them, should be altered or made void; and that then, and from thenceforth, the said uses should be void, and the said *L.* the father and all others should stand seised to such uses as by such writing should be limited. *L.* the father afterwards made his last will in writing, under his hand and seal, and *thereby* did devise the tenements to *J. L.* his younger son and the heirs of his body, and, for want of such issue, to *G. L.* in tail, the remainder to his daughter in fee. The will was sealed and delivered in the presence of four persons, being credible witnesses. The father died; *J. L.* the younger son, entered upon the premises, and made a lease,
and

and G. L. the elder son entered, and ejected the lessee. And the sole question was, whether an actual revocation, or, an act implying so much, might be made *by will*, by force, and within the meaning, of this proviso? It was admitted that all forms and circumstances *expressly* prescribed in the instrument creating the power, were observed; for the will was in writing, signed, sealed, and delivered in the presence of witnesses; but it was contended, that the *words* in the deed, creating the power, were, *according to vulgar speech*, to be understood of a *deed*; and the rather so, because, generally, in such clauses creating powers, *execution*, by *last will*, was especially mentioned. Besides, it was said, that the clause was, that "*from henceforth*," that was (they said) from the *sealing* and *delivering*, "the old uses should be void," which could not be in case of a will, that was ever revocable and took no effect until death.

But it was answered by the court, and so resolved, that, though revocations must observe the circumstances that the owner imposed upon himself, as had been said, yet, *no more* should be imposed upon him: and, therefore, a power of revocation was to be taken liberally, and the execution of it favorably,

favorably according to the nature of property, which was, *that every man should have full power over his own*. As for the words, “*then*” and “*henceforth*” they were surplusage, and of no force; for, the power of revocation was perfect and compleat before it came to those words, in these words “that if it were his pleasure to revoke, then he might, by his writing, &c. declare them void:” and then those words, being needless, should not impeach a clause *certain* and *perfect* without them. And yet, being truly considered, there was no repugnancy in them; for, the meaning was, that he should have power to declare them void, according to his pleasure; that was, according to the nature of his declaration in law; which, in case of a *will*, was from his death, or, according as he should expressly appoint the time. And, therefore, if, in this case, *L.* the father had made a simple writing of declaration, and not in the manner of a deed, to any certain person, that his uses should be void, and had signed, sealed, and delivered it in the presence of three credible witnesses, and had, either in the body of the deed or *verbally*, declared, that it should take effect upon an hundred pounds paid, or at his death, and not before, this declaration would have been good; and yet
would

would not take effect *from the making*, but, from the time appointed, within these words "*then*" and from "*henceforth*": wherefore it followed, that, the former estates being revoked, the *will was good for the whole, working as a will*, which maintained the judgment.

So, in *Hubbard's* case, *Hil. 17 Jac.* one made a feoffment, with power of revocation by *writing*, sealed, and delivered, in the presence of three witnesses, and that he might limit new uses upon the revocation, and that the feoffees should be seised to such uses: afterwards he devised these lands by his will, sealed and published in the presence of three witnesses. This was held to be a good revocation.

Hubbard's
Case cited
Litt. Rep.
218.

Again, where the question was, as to the validity of an appointment under a power, given to a *husband and wife and the survivor* over a reversionary interest *after their death*, to be executed by any *writing* under hand and seal in the presence of two witnesses, and the wife, after the husband's death, married again, and, during coverture, appointed by will under hand, &c. It was objected, that a writing, *in form of a will*, was a defective instrument *here*; for, that

Burnett v.
Mann,
1 Vez. 157.

Vide *Earl of*
Darlington
v. Earl Pul-
teney, infra,
et note dis-
tinction.

that it was not intended to be executed by will, but by some instrument to take effect in the *life-time* of the party, because, *to be executed jointly* : and then, when it was to be executed by the survivor, it ought to be done by the same kind of instrument. *Sed per* Lord Chan. There were several cases, where, when a power was reserved to be executed *as here*, a will, pursuing the requisites of the power, had been held *a writing* within *that power* ; and, therefore, in some instances, where such a power to a feme covert over a personalty had been executed by her by will proved in the ecclesiastical court, he had ordered it to stand over, that it might be proved to have been executed according to the requisites in the power : nor could it be intended, in this case, that the instrument should take effect in life of the parties, *it being over the reversionary interest*. Suppose she, by an instrument not in form of a will, had appointed *expressly* after her death ; it would have been good. *Then* it was no objection, that she had done it by an *instrument*, which spoke *that it was to take effect after her death* ; and the gift appeared to be the *subject* of the power.

Roscommon
v. Fowkes,
4 Brown.
Parl. 523.

And so it was held in the case of
the Countess of Roscommon vers. Fowkes.
4 There

There *E.*, the wife of *F.*, having had a considerable estate in *East Meath* and *Clare*, and in the city of *Limerick*, descend to her in fee by the death of her father, and being also intitled to an estate tail in other premises, being so seised, by indenture conveyed the same to trustees; and *F.* covenanted therein, that he and his wife would, by a certain time limited therein, levy fines of the said premises upon the following uses; namely, as to all the estates in the county of *Clare* and city of *Limerick*, (except as therein mentioned) and also certain premises in the county of *Meath*, to the use of *F.* for life, with remainder to *E.* in strict settlement; and as to all the premises in the county of *Meath*, (except the before-mentioned premises,) and all estates comprised in the said fines, of which no use was before limited, to the use of trustees, upon trust, by sale or mortgage, to raise such sum of money as *F.* and *E.* or the survivor of them, should, by any writing under their hands and seals, or, under the hand and seal of the survivor of them, attested by two or more credible witnesses, direct or appoint; and, after raising and payment of such sums, &c. to convey the residue of the premises unsold, and the equity of redemption of such as should be mortgaged, to *F.* for life, and, after his decease,

cease, to such person or persons, and for such estate and estates, &c. as the said *E.* should, by any *writing* under her hand and seal, &c. direct, limit, or appoint; and, for want of such direction, limitation, or appointment, to convey the same to her and her heirs and assigns for ever.

And in this indenture was contained a proviso, in the words following: “ Provided always, and these presents were upon this condition, nevertheless, that, if there should be no issue by the said *F.* on the body of the said *E.* his wife begotten; or, being such, all of them should die in the life-time of the said *E.*; that then, and in such case, it should and might be lawful to and for the said *E.* by *any writing* under her hand and seal, attested by two or more credible witnesses, (notwithstanding her coverture, and as if she were sole and unmarried) to revoke, alter, change, or make void, all or any the use or uses, estate and estates, trusts, limitations, declarations and agreements in these presents contained, except the estate for life limited to *F.* and, except such estates as should be sold or mortgaged for raising money, as aforesaid, and, “ by *the same*,” or “ *any other deed*,” (notwithstanding her coverture, and as if she were sole and unmarried) to
grant

grant, limit, and appoint, the same premises, or any part or parcel thereof, to any person or persons whatsoever, for such use and uses, estate and estates, either in fee-simple, fee-tail, or, for life or lives, or for any term or number of years, determinable upon any life or lives, or any term or number of years certain, and charged and chargeable with such annual sum and sums of money, and in such manner and form, as the said *E.* should think fit, direct, or appoint; any thing therein-before contained to the contrary notwithstanding.

Fines were levied according to the covenant before-mentioned, and then *E.* not having any children living, *duely made her last will in writing* (or, *writing in nature of a will*) under her hand and seal, and in the presence of three credible witnesses, who attested the same in her presence, dated the the 13th *January*, 1784, and, thereby, without taking notice of the settlement of 1726, she devised all her estates which descended to her, and in which she or her husband, in her right, or any other person in trust for her, then had any estate, subject as therein mentioned, to her husband and his heirs.

F

Soon.

Soon after the making of this will, *viz.* in *July*, 1735. *E.* died.

And one question, that arose on the case, was, whether *E.* had *properly* executed the power by her will? Those who argued that the power was *not* well executed, contended, that, according to the words and intent of the power reserved to *E.* by the deed of *June*, 1726, it ought to have been executed *by deed*, and not *by will*. That two powers were reserved to *E.* by the deed of 1726, one to revoke the uses of the estates in *Clare*, by deed; the other, to limit such parts of the estates in *East Meath*, as remained unfold, by *any writing*. Now she had made a will *without* reciting any power, and, thereby, gave all her estate to *F.* which might be a proper execution of the *latter* power, but not of the *former*. It was reasonable, therefore to suppose, that she only intended to do what she regularly had done: and, upon this supposition, she had provided for her husband in an ample manner for his life, and even given him some part of the estate in fee; but had permitted the other part to descend to the heir at law of the family: and this seemed to be a reasonable and equitable disposition.

On

On the other side it was contended, that, by the power which *E.* reserved to herself in the settlement of 1726, she was enabled by *any writing* under her hand and seal, attested, &c. to revoke, and change, all the former uses therein limited : and, *by the same "writing,"* or "*any other deed,*" to appoint new uses : and that her will, (or the writing in nature of her will,) was a good execution of this power of revocation and appointment ; it being *a writing* under her hand and seal, attested by three credible witnesses ; and *substantially*, as well as *literally*, answering the description, and comprising all the requisites of the power. That, to confine the execution of the power, as if designed to be by deed only, by reason of the latter words in the proviso, "*by the same or any other deed*" and to infer from thence, that the *writing* expressly mentioned in the former part of the power, and referred to, even in this latter branch of it, must be only such a writing as was, in point of law, a deed, would be, to make a construction of the power directly contrary to the former part, which enabled her to revoke the old uses *by any writing* ; as well as to the latter part of it, which enabled her to appoint new uses *by the same writing* ; and would be, to defeat

and take away the operation of clear and plain words by implication and inference only : and upon these principles the judges present in the House of Lords were clearly of opinion, that *this writing* was a good execution of the power.

And, though such power reserved to be executed by *a writing*, be executed by *several* assurances ; yet, if they have in their natures such a relation to each other, as, that they can be considered *as making together one entire conveyance*, this will be a good execution of the power.

Earl of Leicester's Case,
1 Vent. 278.
S. C. Raym.
239, et 2 Lev.
149, by the
name of
Wigson v.
Garrett, et
S. C. by
same Name,
3 Keb. 366.
489. 510.
556. 572.
Vid. 4 Mod.
265.

Thus, where *L.*, in the 21st of *Eliz.*, levied a fine of the lands in question to the use of *P.* and his heirs, for payment of his debts ; reserving a power to himself to revoke, by any *writing* indented, or by his last will, subscribed with his hand, and sealed with his seal : sometime after, namely, in the 26th of *Eliz.*, *L.* covenanted by writing, (sealed and subscribed as aforesaid,) to levy a fine to other uses ; and, four years after the covenant, a fine was levied accordingly ; the question was, whether this should be taken as a revocation, and so an execution of the power ? It was argued that this should not be a revocation ; for it was said

said that, in powers of revocation, there was to be considered the *substance* and the *circumstance*; and that which revoked must be defective in neither. The deed *alone*, in this case, could not revoke; for, though it had the *circumstances* limited, namely, indenting, writing, sealing, subscribing; yet, it wanted *substance*; for it did nothing *in presenti*, but referred to a future act, *viz.* the fine. That the fine *alone* could not revoke, because it was defective in the *circumstances* contained in the power; then, to consider them both together, how could it be conceived that the fine should communicate *substance* to the deed, or the deed give *circumstances* to the fine? That, to this argument, it was objected, that the covenant and the fine made but *one* conveyance; it was answered, if so, then the words of the power *here* were to revoke by *deed*, and *not* by *deed and fine*. Again, it was said, that this construction was repugnant to the words of the power, which were, “ that it should be lawful for him to revoke *by his deed* :” and yet it was agreed here, that the deed of itself was not sufficient to revoke, but only in respect of another act done, which (as it must be observed) was executed at another time. The books agreed, that a condition or power, &c. might be annexed to an estate by a distinct deed

from that which conveyed the estate ; but not unless *both* were sealed and delivered at the same time, and so were but as *one* deed : but in the present case, the deed was made in one year, and the fine levied in another. Suppose a power had been created with such circumstances as were in this case, and then, at one time, a deed had been made, which contained some of them ; and then another deed, comprehending the rest at another time, would both those make a revocation *as one deed* ? Surely not. Suppose the fine had been levied first, and then, afterwards, such deed had declared the uses ; surely the power had been extinguished by the fine, though *then* the fine and deed might be taken as *one* conveyance, as well as in this case. Besides, it was said that the *different nature* of these instruments was *such*, that they could not be taken as *one* intire act within the power ; for the covenant was the act of the party, and the fine, the act or judgment of the court. But it had been objected, that this ought to have a favorable construction ; the answer to this was, *not so as to dispense with that form which the execution of the power was limited to be attended by. Sed per Hale*, upon the close and nice putting of the case, this might seem to be no revocation ; for, it was clear, that
neither

neither the deed or fine by *itself* could revoke: but, *quæ non valent singula, juncta profunt*. The case of *Kibbet v. Lee* trod Supra. close upon this case; for *there* the uses were to cease *then*, and *from thenceforth*: whereas a will could have no effect until death. The circumstances therefore did *strongly* import, that the meaning was, that it should be done by deed: now *there* the will *alone* could be no revocation; for clearly he might have made another will after, and therefore it required other matter to compleat it; namely, the death of the devisor. *Et per totam curiam*, the deed and fine taken together, were resolved to be a good execution of the power, and judgment was given accordingly.

And, although the levying the fine preceded the execution of the deed, declaring the uses; yet, it being found by verdict that the fine was levied to the uses declared in the subsequent indenture, the power was held, after great argument, to have been well executed.

Thus, where *A.* made a settlement with power of revocation, by deed indented, and signed by two or more witnesses. *A.* levied a fine, and, *ten days afterwards*, by deed indented signed by two witnesses, declared Herring v. Brown,
2 Show. 185.
S. C. 1 Vent.
268, 371.
S. C. Skinner, 53. 72.
186.

the uses of the fine new, and different from those of the settlement. And on a special verdict in ejectment, the jury found the facts stated, and that the fine was levied with an intention to make partition between *A.* and *B.* and to the uses declared in the new indenture. And hereupon one question was. If this were a good revocation? and upon that head it was argued for the plaintiff, that, the execution was good; that, the power was as general as any whatsoever; that, had there been no fine in this case, the deed executed according as the power of revocation required would have been sufficient for the plaintiff; that, this was a case of construction, and that everyone might apprehend that *A.* intended this fine as an execution of his power, and that it must be taken all as one assurance, and the fine but as a part of it; that, the deed was between the same parties and of the same estate; and that, it was a common practice to acknowledge a fine, and afterwards at leisure to execute the deed of uses; that, the true intention of the parties was to make but one settlement, and the law would make a strain to follow the intention, but never to destroy it; that, it ought to be reckoned but as one assurance, for it was no more; that, the law would not judge by parcels, but, after all the act was done,

done, would judge and make construction of the whole; that, in some cases, the law would find out an intention to make a conveyance good; that, here it was found *expressly*, that the fine was levied with an intention to make a partition, *and also to and for the uses of the subsequent indenture*, and that this was the meaning of the parties; that, it was likewise found by the jury that there was no other use of the fine; that, an indenture subsequent to a fine would declare the uses of it; that, if a man agreed to levy a fine, the uses might be declared by word of mouth; the fine was the superior act and drew the deed to it; the agreement was the thing material; the intention governed all. And the Earl of *Leicester's* case in *Nixon v. Garrett* was cited.

But, on the other side it was contended, that the fine and *deed subsequent*, could not be a revocation according to the power. First, to consider the fine alone and what relation it had to the power of revocation. It did appear, that, at first, they were tenants in common in fee, and that the fine was levied to make a partition; that, if this were not construed a partition, then, all *A.'s* statutes and recognizances would still bind a moiety of the other's estate. The com-
mon

mon way was, to levy a fine to trustees and to declare the uses severally, and it was doubted if they could do it otherwise. By the common law they were not compellable to make partition, and they were seised of several freeholds, and one would not pass to the other without livery, so that here was a partition made. Then it was considered that here was no revocation; for by the fine (were there no more in the case) this power would be extinguished. The fine being levied and no deed being at the time of levying the fine, it produced two effects. First, it was a forfeiture of his estate for life, he being but barely tenant for life, and an immediate right was given to him in remainder. Secondly, it was an extinguishment of the power; for, by virtue of the fine, the power of revocation was gone. There was a fine levied and a time when there was no deed, and how was it then? Suppose *A.* had had an estate greater than for his own life, had levied the fine and then died before any deed made, the power had been gone. If there had been no deed made there had been the same uses as now, the fine being levied by *A.* to the use of himself and his heirs: and yet, without such deed, it would have been no revocation. That, if it could enure, in this case; as *one*

con-

conveyance, it must be as relating and supposed to be made at the time of the fine; and how could the court *terminate* at what time a deed should relate. If at six months, it might be seven years after. And if it were so, yet, according to them, it should relate to make but one common conveyance. And, as to the intention of the parties, that was nothing; for an intention was not to be pursued by illegal means. Here was a time when there was no power left. But there was not one word or syllable that it was the intent of the parties to revoke the uses, but *only* to have a fee, and the fine wrought that as much without the deed as with it. It was true, that the jury had found that the fine was levied to the uses in the indenture, which made neither one way or the other; if it had any influence it would be on the side of the defendants: *viz.* to prove, that at the time of the fine, these uses were raised; and, if the intention governed all, the jury had found the same; and so, by their finding, the *fine* was a *perfect conveyance at that time*. Then a fine to such uses was no revocation; and the jury had not found that the parties, at *the time* of levying the fine, *did* intend to make *such* an indenture; but only, that the fine was to such uses. All that was subsequent was but a recital of their thoughts.

There

Supra.

There could be no pretence but on *Scroop's* case, because this deed did not raise the uses, *they* were raised before, the deed was only to declare them. It was *merely* the putting into writing on parchment the uses which the fine raised by way of memorandum. If a man once levied a fine, he could not limit any new uses, but what were raised by the fine. The deed itself did not raise, or pretend to raise any new uses, but only recited a fine levied to the use of *A.* and his heirs. Suppose there had been only a parol declaration, would that have done it? the conveyance was fully ended before this deed came; the use must arise *then*; it could not arise by this deed, which could not speak before it was made. In *Nixon* and *Garret's* case, the deed was precedent and pursuant to all the powers of revocation, and raised the uses of the fine; and the fine, though it conveyed the land, yet it did not raise the uses, the deed did that. In the present case it was quite contrary: by the fine there was a perfect conveyance, and the estate of the conusor destroyed, and the interest, of the remainder man to enter, vested before the deed came; there, at the time of the deed, was a power extant in being; but it was otherwise in the principal case. If this deed would work by way of revocation, it was all

Supra.

one whether the remainder man had entered for the forfeiture or not, for this relation would have divested his right.

After many solemn arguments, it was held by C. J. *Herbert*, *Holloway* and *Wright*, that the fine was an extinguishment of the power, and that the deed came too late; contrary to the opinion of Justice *Withens*. But in error brought on this judgment, it was reversed by the opinion of six Judges against two. And it was resolved, that the fine, and deed though subsequent, was but as one conveyance, and therefore were a good execution of the power; viz. a good revocation of the former uses and a good declaration of the new uses.

Vide Skinner
187.
1 Will. 169.

But the counsel, on behalf of the plaintiff in the foregoing case, admitted, that, if the fine had been *general* it might have been an extinguishment; and this opinion seems warranted by the observation of Lord *Hale*, in *Nixon v. Garret*, who said, that if the fine, in that case, had been levied *first*, and then, the deed, to lead the uses, made *afterwards*, the power would have been extinguished by the fine. And *then* no revocation of that which had no being could have been by the deed. But it does not appear

1 Vent. 290.

in the reporters of the foregoing case, that this distinction was taken in the House of Lords, although the facts of the case warranted it, according to the finding of the jury. *So quære.*

1 Vent. 290.

And upon the same principle that governed in the cases of *Nixon v. Garrett*, and of *Herring v. Brown*, Lord *Hale* said, in the former of those cases, that if a deed of revocation were made, by virtue of a power, similar to that then in question, and if the party who executed the power had declared that it should not take place until 100 *l.* paid, although, in that case, it would be executed by several acts, and of several natures, yet when the condition were performed it would be sufficient.

Earl of Dar-
lington v.
Pultney.
Cooper 260.

But, if the *specific* nature of the instrument by which the power is to be executed, be *expressly* mentioned in *that* which creates it, it cannot be carried into effect by any other *mode* of conveyance. As where *William*, Earl of *Bath*, (being *then* tenant for life in possession of certain hereditaments in fee, and also intitled to the ultimate remainder of certain other hereditaments, in fee, expectant on several particular estates,) and *William Pultney*, commonly called Lord *Pultney*;

Pultney, the only son of the said Earl of *Bath*, (being, then of age, and tenant in tail in remainder of the same premises immediately expectant on the decease of his father,) by indenture of bargain and sale, bearing date the 2d Jan. 1753, conveyed all the said premises to *Thomas Newton*, to make him tenant to the precipe for the purpose of suffering two recoveries thereof; the uses of which it was declared should be, (after limiting the same to the Earl of *Bath* for life, and subject to a jointure of 1500 *l.* a year to Lady *Bath*,) to the use of such person or persons, and for such estate and estates, and in such manner, and upon such trusts, and subject to such provisos, powers, and agreements, and for such intents, and purposes, as the said *William*, Earl of *Bath*, and *William* Lord Viscount *Pultney*, by any of their “*deed*” or “*deeds*,” (either with or without power of revocation) to be by both of them sealed and delivered in the presence of two or more credible witnesses, should, from time to time, jointly grant, direct, limit or appoint. And, in case of the death of either of them, the said *William* Earl of *Bath*, and *William* Lord Viscount *Pultney*, then, ‘as the survivor of them, by any “*deed*” or *deeds*,” to be executed as aforesaid, should, from time to

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time,

time, alone grant, direct, limit, or appoint, and, in default of such appointment, to the uses they before stood limited to.

In *Hilary* term 1753, the two common recoveries were duly suffered. On the 12th of *February* 1763, Lord *Pultney*, died, without having executed, or, joined with his father in the execution of, any deed of appointment of any of the said hereditaments, and without issue. On the 23d of *May* 1763, the Earl of *Bath* made his will; and, thereby, gave a piece of ground, with the erections thereon, which was part of the estate comprized in the indenture of the 2d of *Jan.* 1753, and the recovery suffered in *Middlesex* in pursuance thereof, to his said brother in strict settlement. And, the question was, whether this piece of ground passed by the will of *William* Earl of *Bath* deceased?

The decision of this question turned upon this point; namely, whether this will of the Earl of *Bath*, was a good appointment under the power contained in the indenture of 2d of *January* 1753; or, in other words, whether it was for this purpose a *deed*?

And, in support of the execution of the power, it was contended, that this was a
power

power reserved by the donor to himself, and that such powers had always been taken largely ; for though, before the recovery was suffered, the Earl of *Bath* was not absolute owner of the inheritance, yet, after the recovery, he became so, and Lord *Pultney* was in the same situation. That the question then would be, whether it was the intention of Lord *Bath*, to dispose of this property ? and that it was his intention, was manifest. If so, the only question was, whether the instrument that he had made use of was proper for the purpose ? that, though *every will* was certainly not a deed, yet, if a will had all the essentials of a deed, as this will had, it should be taken to be *a deed*. *Spelman* in his Glossary, title "*Factum*" and title "*Testamentum*," defined them both by the common technical name of "*Carta*." That a strong circumstance to shew that the Earl of *Bath* meant this should be taken as a deed, was, that the will was *sealed*, which was no part of the ingredient of a will, but was of the very *essence* of a deed. Therefore, that the substantial part of what the instrument giving the power enjoined had been complied with ; which was *all* that was necessary.

But the opinion of the court, as delivered by Lord *Mansfield*, was, that the power was not *duely* executed by the will of the Earl of *Bath*; for, his lordship said, that there were, in this case, no words to lay hold of, upon the construction of which the execution of the power could be supported. For, the *first requisite* which the power imposed was *not possible* to be performed by will; which was, that it should be by *joint deed* of Lord *Bath* and his son. Now there could not be a *joint will*. It was true the survivor had the same power; but *then* it was “*emphatically*” reserved to be executed by “*deed*.” Now the word *deed*, in the understanding of law, had a *technical* signification, to which a will was in no respect applicable. If any words had been thrown in, such as *writing, instrument*, or other *term* of a general comprehensive meaning, it might have been fair to have taken advantage of it in favor of the intention. But, *here*, were no such general words; and the intention, of the person who created the power, could not properly be fulfilled unless the *form* was *strictly* pursued. Therefore, in this case, he did not see a possibility of saying, that a *will* was a *deed* within the terms of the power; and the court certified accordingly.

When

When a power is given to appoint uses of land, or of personal estate *generally*, or by *will*, or, by deed *expressly*, without *prescribing* the manner in which either of them is to be executed; the instrument is intended *in law* to be such an one, as, in the utmost strictness of law, is proper for the disposition of *that*, which is the *subject matter* upon which the power is to operate. Consequently, if the subject of the power be *land*, and it be to be executed by *will*, the will must pursue the form required by the statute of frauds.

Longford v. Eyre.
1 Will. 740.
et vid. Wagstaff v. Wagstaff.
2 Will. 258.

But, if the subject of the power be *personal property*, it may be executed by a testament in the ordinary form.

Thus, where *D*, by will, had given several shares in the *Sun Fire Office* to *F*. his daughter, and, after her decease, to such persons as she by her will should direct; and had also devised real and personal estate in *Jamaica*, in moieties, the one moiety to *F*. for life, and, after her decease, to such person as she by will should direct; the other moiety to *R*. in like manner. *F*. by her will, reciting *that* of her father, disposed of the *Sun Fire* shares, and also of the real estate; but the will was not duly executed

Duff v. Dalzell.
Brown Ch. Rep. 147.

to pass real estate, there being two witnesses only to it. It was objected, that, where the power was to be executed by will, it must be such an *one* as would pass the property that was the subject thereof; and that, therefore, as land as well as personalty was the subject on which this power was to attach, the testator, meaning to give a power over both, must have intended that the instrument should be *such*, as would dispose of the real estate as well as the personal. *Sed per curiam*, the will, being sufficient to pass the personal estate, was, so far, a good execution of the power.

But, where *no interest* passes from the *donee* of a power, attaching upon lands, directed to be executed by *will*, but he is a mere instrument, to apportion *thereby* that, which *another instrument* has created and given; in such case, as he is not the person who *makes* the *charge* or *affects the estate*, it is not necessary that *such* will, by him made, should be conformable to the statute of frauds.

Jones v.
Clough.
2 Vez. 365.

Thus, where, on the marriage of C, an estate was settled to the use of himself for life, with remainders over in the common form. Articles were entered into, when J. the eldest son, and T. the younger son, of C.
came

came of age, reciting the settlement, and that, whereas there was *thereby* no provision or portion of maintenance for younger children, though several were then living; to the intent therefore that 300 *l.* might be raised, C. the father, J. and T. *had taken it into consideration, and agreed* that 300 *l.* should be raised in and upon all or part of the estates, from and immediately after the death of C. and to be paid to such younger children in *such manner and form, as he should, by his last will duly executed, direct and appoint*; and, in order to have the same effectually done and assured, the *two sons* did covenant, grant, promise, and agree jointly and severally, for themselves, their heirs, &c. that, after the father's death, any part might be granted, mortgaged, or disposed of, for raising the 300 *l.* to be paid as the *last will and testament* of C. should *direct and appoint*, and to no other use.

The father, by will, attested only by *two* witnesses, particularly distributed this 300 *l.*

J., dying without issue, but having first suffered a recovery of part, T. became tenant in tail of the rest; and *then* insisted, that the provision, made for himself and the rest of the children, could not take effect,

as there was not a proper execution of the power; the will not being such as would pass lands *according to the statute of frauds*, all the requisites of which he contended were required by these articles; for, the addition of the word, "*duely*," was tantamount to "*legally*."

Sed per curiam, the question was, whether this was such a case as fell within the reason of the statute of frauds? The solemnities in the statute were required *only in devises of lands*, but it went no further. Consider whether the father, by the *articles or will*, parted with any thing in his *power to give*. By *the settlement* he was *bare tenant for life*; and *by the articles* he had granted *nothing*, they being to take effect *after his death*. The agreement indeed was recited to be between the father and two sons, and referred to the act of the father by will *duely* executed: but, in the next clause, which was to charge the estate, the two sons *only* covenanted and granted to the trustees that this 300*l.* should be a charge; and it was upon *their* estate; and the *intervention* of the father was *only to apportion* the sums. It was not *his will*, that *actually* made the charge, he was only referred to as a proper person *to appoint* the sums. The word, *duely*,
was

was in the agreement, as recited, but *not* in the covenant of the two sons. But it was not necessary to lay any great stress on that ; because, supposing it had been the case of the owner of the estate reserving to himself a power by will, without adding *duely* or *legally*, he admitted that, in such case, his act must be such, as answered the utmost idea of the word *duely*, though a *will* had been only mentioned. But *certainly* there might be cases, where the words “ *duely executed* ” might not require the solemnity of the statute of frauds ; for, if *no lands* were given by the person making the will, that will would be *duely* executed, though there were not those witnesses the statute required ; *because* those words must refer to the *nature* of the *act*, and to the *nature* of *that* which was to pass by it. Here, two persons, who had power to charge the estate, had done it by articles, but referred to the act of a third, *merely*, for *the purpose of apportioning* ; and though the third happened to be a father, it would be the same as if it had been a mere stranger : if, therefore, *one* should charge his estate with a sum, to be divided as a mere *stranger* should think proper *by will*, the necessity of its being a will conformable to the statute did not occur.

And when a provision for younger children was thus attempted to be defeated by one who was a younger child, he would lay hold of any circumstance whatever, on which any weight could be laid: and, supposing the father, having no landed estate, executed a will, whereby his intent was sufficiently declared in what manner this should be divided, it would be good, though there were not such *circumstances* as would have been required, when an *interest* was to have passed from him. Upon the whole, therefore, the court was of opinion, that this will, though executed in presence of two witnesses only, *considering it as a will, whereby* the father passed nothing *by way of interest* from himself to them, but *merely* acted as a collateral person, was sufficient to warrant the court in saying, that it was a proper execution of this power.

Vid. Rofs v.
Ewer,
3 Atk. 156.
S. C. *infra*.

But, if the instrument for executing a power relating to personal property be *expressly* required to be attested by *two* witnesses; a will, not *so* executed, will be invalid, although that form be not *in law* requisite to a testament of personal estate; for the instrument, in such case, must comply with the requisitions imposed by the donor of the power.

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Upon this principle it was held that, when a power was reserved to be executed by *deed* or *will* in writing, a *nuncupative will*, though made *previous* to the statute of frauds and when a man might dispose of a *trust* by *parol*, was not a good execution of a power.

Thus, where *A.*, seised of lands in fee, by settlement limited a term for one hundred years to trustees, in trust for such uses, intents, and purposes, as he, by *deed* or *will* in *writing*, should declare, direct, limit, or appoint; and, for want of such *will* or *deed*, to attend the inheritance. *A.* being a bastard, died without heir, having *first* made a nuncupative will, and, thereby, devised as follows; namely, I give "*all, all,*" to *J. S.* *J. S.* took out administration with the will annexed, and the question was, whether the power was well executed, or whether the term should escheat with the inheritance? It was contended in support of the will, that it was made long before the statute of frauds and perjuries, and *then* a man might have *disposed* of a trust by *parol*; and that the words "*all, all,*" in this nuncupative will, would certainly carry the term; and, therefore, it was insisted, that it was well appointed to the administrator with the

Thrxuton v.
Att. Gen.
1 Vern. 340.

the will annexed. *Sed, per curiam*, though, generally speaking, a man, *before* the statute of frauds, might *dispose* of a trust *by parol*; and the words, “ *all, all,*” would be sufficient to pass a lease for years, yet, in this case, the term being *expressly* settled by deed upon these trusts, namely, for such uses, intents, and purposes, as he, by deed or his last will *in writing*, should appoint, and, in *default* of such appointment, *then* to attend the inheritance; this restrained and tied up his hands from making any *parol* disposition: and the court took his intent by the words, “ *all, all,*” to be all that he could dispose of by *parol*.

Dey v.
Thwaites,
cited 3 Ch.
Ca. 69, re-
ported
2 Vern. 80,
but this Point
was not made
there. Vid.
S. C. inf. et
Note Obser-
vations there.

And, upon the same principle, it is held that, if the creator of a power direct it to be executed by a writing testified by *two* witnesses *only*, an instrument *so* executed, *though purporting to be a will*, will be valid, in law, to carry that, which is the subject of the power, *although it be land*.

And if a power be executed by will, such will cannot be made use of, either at law or in equity, until it hath been proved in regular form as such.

Thus,

Thus, where a *feme covert*, having a power to appoint personal estate by will executed in the presence of two witnesses, had *left* a testamentary paper not *so* testified, by which she disposed of a part of the property subject to the power. Lord Chancellor *Hardwicke* objected, that this was *no will*, because it had not been proved in the ecclesiastical court: which was attempted to be answered, by urging that it was *only a writing of a feme covert* executing a power, and not *strictly a will*, the husband not consenting to it; so that it could not be a will, neither could it be proved in the ecclesiastical court; but was only a power which would take its operation from the original deed by which it was created. But, his lordship was of opinion, that, though, in the notion of law, a wife could not make a will, yet, when a *feme covert* had a separate power over her estate and might dispose of it by will, whatever sort of writing she left, it ought first to be propounded as a will in the spiritual court.

Ross v. Ewer,
3 Atk. 156,
inf.

And an instrument, made in execution of a power, retains all its essential properties and qualities; and is, in law, considered as liable to all collateral circumstances, in like manner as it would have been, if made with
any

Hatcher v.
Curtis et al.
2 Freem. 61.
S.C. 2 Eq. Ca.
Abr. 671. 3.
et per Lord
Hardw.
2 Vez. 77.
1 Vez. 139.

Vide Cotter
v. Laver, in-
fra.

any other view. It follows, therefore, that a will, in execution of such power, (suppose it to be of lands) would be alterable, or revocable, according to the statute of frauds, *by cancellation, &c.*; or, according to law, by any of *those methods* which would effect the same, in case of a *strict* or *proper* devise.

So, if the *appointee*, under a power executed *by will*, die *before* the *appointer*, all interest which he would have taken under such will, had he survived, will lapse; for, although the interest of the appointee arises out of the power to make a will, and the general notion of law, as to a power, is, that any one, taking under the directions of a will made in the execution of a power, takes under the power in the same manner as if his name were inserted therein; yet they must take according to the nature of the power and instrument taken together; therefore, if a power be executed by will, it must be construed to all intents like a will; of the essence of which species of conveyance it is, to be ambulatory, revocable, and incomplete, until the death of the maker of it; nor can any one, dying in the testator's life, take under it. Therefore, a person appointing by will, from the nature of
of

of the instrument he uses (which every one is supposed to know) *does the same*, as if he *particularly* expressed, that the appointment should only take effect in case the appointee survived.

Thus, where, on the marriage of *A.* with *B.*, 10,000 *l.* was, by articles dated 1718, vested in trustees, to be laid out in the purchase of lands to be settled on the husband and wife for their lives, then for the issue, if any: if none, a term of 500 years was created, that, if the wife died in the life of the husband, the trustees should raise and levy 4000 *l.* for such person or persons as should be next of kin, (and for none other whatsoever,) as she, by any deed or will, or writing under hand and seal, purporting to be, or in nature of, a last will, should, notwithstanding coverture, direct, limit, or appoint, to be paid within twelve months after due, in such manner as she by the said deed, &c. should, &c.; and for default of appointment, &c. but if the money were not laid out in lands, *then*, after payment and deduction of the 4000 *l.* to such as she should appoint as aforesaid, the residue and surplus should be paid to the husband.

Oke v. Heatt,
1 Vez. 135.

There

There being no issue living, the wife, in 1743, made *a will*, and, reciting her power, she directed, limited, and appointed the 4000*l.* to be paid to her *nephew* G. for his own use and benefit; G. died *in the lifetime* of the appointer; *then* she died, her husband surviving: a bill was brought by the next of kin claiming under the articles, by the statute of distribution, in default of appointment, by reason of the death of the appointee in her life; and a cross bill was brought by the father of the appointee, as representing him, to have the benefit of the appointment.

It was contended, on the part of the father, that the testatrix had executed her power, although that execution, during her life, was revocable arising from the nature of a will, by which species of conveyance it was appointed with that intent. The question therefore was, whether the contingency, so far as it depended on her nomination, being executed and put an end to by her, the appointee had such an interest as was transmissible to the representative? The general objection thereto was from its being a testamentary disposition, and, like every other bequest, subject to lapse; which, it was admitted, would have been the case, if

if merely testamentary. But it was said that this was not *properly* a *legacy*; the settlement having *entirely* disposed of it to such of her kin as she should appoint, leaving her only a *naked power* and no property; so that she could not give it to any other but to those to whom she was confined to give it: and, that the power operated, *as if the execution thereof had been in the original instrument*; and, if so, notwithstanding his dying in her life, it would go to his representative. The reason why a will passed no right till the testator's death was, from the notion the law had of its passing part of the testator's property; but, that was when the person took only by the will.

But, it was held *per Lord Hardwicke*, Chan. that this instrument was void by the nephew's death in the life of the testatrix; for, though it arose under a power, it was a testamentary disposition, and this was a testamentary case. This was a power over her own property, and part of the ancient dominion which she had over this money. She had executed her power by will, and called it so throughout. The whole frame was testamentary, and there were plain declarations to that purpose. And, wherever there was such a power to a married woman,
which

which she executed by will, it was subject to all the qualities of a will; which *manifestly* differed it from the uses of any other writing or deed, which would be complete, and not revocable, *in which cases* it must *vest*.

Duke of
Marlborough
v. Lord Go-
dolphin,
2 Vez. 61.

So where *Charles*, Earl of *Sunderland*, in 1720, made his will, whereby, among other bequests, he gave 30,000 *l.* to his wife, and also other legacies; and the rest and residue of his personal estate to his eldest son, “except such other legacies as he should indorse on the back thereof, in nature of a codicil in his own hand-writing.” He, afterwards, by a codicil indorsed on his will, without a date, directed the legacy, given by his will to his wife, should be to her own use and benefit for and during the term of her natural life *only*; and, after her decease, to be divided and distributed to and amongst such of his children, *and in such manner and proportion*, as she, by any deed, or will, or instrument in writing in nature of a will, should direct and appoint; and for no other purpose whatsoever. He died in 1722, leaving his countess and seven children. She afterwards married a second husband, but, by settlement made upon that marriage,

riage, reserved to herself power to make a will concerning the interest and improvement of that sum.

In 1736, her husband then living, she made a will, and, after reciting that she had previously appointed two sums, part of the 30,000*l.* to two of her children, she said this was her last will and testament, and that, in pursuance of the power and authority given by the will of her husband, (which, with the codicil, she recited,) and of all other powers, she thereby gave, directed, and appointed the remaining principal sum to be paid, to the several children of Lord *Sunderland* after-mentioned, in the several proportions therein particularly specified.

Two of the children died in her lifetime, after her making this will, and then the countess died. A dispute arose between the representative of the executor of the Earl of *Sunderland*, (who claimed the legacies of the deceased children as undisposed and unappointed, being lapsed,) and the representatives of the deceased legatees; the event of which depended upon the question, whether any interest *vested* by this instrument in the legatees *during* their lives, and,

H

confe-

consequently, would be transmissible to their representatives, or, whether their legacies under the appointment, it being *by will*, or instrument in *nature of a will*, were not, by their death, in the life of the appointer, lapsed, as undisposed and unappointed. And Lord *Hardwicke* was clearly of opinion, that nothing was vested *thereby* in the legatees during their lives, and, consequently, nothing was transmissible to their representatives.

There is a case, however, which, in point of time, preceded both the last-mentioned decisions, and was stated by the counsel, who, in the preceding case, supported the claim of the representatives of the deceased legatees, as in point to their argument ; but, which was contested on the other side ; and held by the court, to be a case resting upon its own particular circumstances, and an exception to the general doctrine established by the cases of *Okes* and *Heath*, and of the Duke of *Marlborough* and *Godolphin*. The case I allude to is that of *Burnet v. Holgrove*, loosely reported in 1 *Eq. Ca. Abr.* 296. 2. There *A.* devised an estate to his wife for life, remainder to *A.* his niece and her heirs ; upon condition, and to the intent, that she paid 400*l.* to such person as
his

Supra.

Burnet v.
Holgrove,
1 *Eq. Ca.*
Abr. 296. 2.

his wife, by her will in writing, or any other writing, should direct and appoint, and *afterwards* died. The wife married a second husband, and then made a will in writing, and, thereby, reciting the power given her by her former husband's will, appointed the 400*l.* to be paid to her second husband, his executors, or administrators; and that, when he should have fully received the 400*l.*, he should pay 100*l.* out of it to *B.*, 50*l.* to *C.*, and 50*l.* to *D.*; and made her husband her executor; and then went on and said, that she had published this her last will and testament in the presence of three witnesses; and the husband subscribed, that he did approve of this will. The husband died before her, and made *her executrix* of his will, and residuary legatee. Then *B.* and *C.* died both intestate, and afterwards the wife died; and the defendants took out administration to her with the will annexed, and also administration to *B.* and *C.* The question was, whether this appointment being made by will, and the appointee dying before the appointer, this should be in the nature of a legacy, and so the appointment void, the testatrix surviving the nominee? And it was held by Lord *Harcourt*, Keeper, that if it had been a thing *merely* testamentary, it would plainly have been

a lapsed legacy ; but that, in this case, the 400 *l.* was not in its *own nature* testamentary, but they took as *nominees*, and it was *but* the execution of a trust, and his lordship decreed the money to be paid:

2 Vezey 80,
81.

Supra 93.

Lord *Hardwicke*, in observing upon this case, which was pressed hard upon him in the preceding case of the Duke of *Marlborough* and *Godolphin*, and which it was certainly incumbent upon him either to deny to be law, or to explain, observed, that, if well considered, it was no authority against the opinion he then gave, or that which he had given in *Okes v. Heath* ; for in the case of *Burnet v. Holgrove*, the person executing the power was not limited in respect of the objects. It was a *general* power to such as *she* should appoint. She appointed to her second husband, who died in her life-time, and made her executrix ; so that it was really *come back* to *herself*, and her representative claimed it under the *execution* of the *power*. That was a case to tempt a court of justice to go as far as possible to make it good ; because it was *come back* to the person who gave it ; and was the same thing as if given to her *own* benefit. It was no doubt in her power to appoint *her executors* originally if she had pleased, because
she

she might appoint *any* person whatever : and, therefore, the court might consider the executors or administrators in this case, so as not to make them take *by representation*, but by *description* of the *person* to take, and there was something in the case which favored that. It was imperfectly reported in Equity Cases abridged. Executors might *certainly* be made use of, either in a deed or will, as *distinct* and *separate* persons from their testator, which was the case of a special occupant. 2 Roll. Abr. 151, where the executor should be special occupant ; which shewed that executors might take by *that name* as *distinct persons*, and not *in representation* of the testator. The court could not be sure on what ground Lord Harcourt went in that case, yet there was room for that construction on the words ; and always were to be taken, in such a case, to support the appointment, as it was to be considered as if *originally* given for *her* benefit. But, whether that were so or not, it was a single authority, and was a cause heard by consent, which certainly weakened its authority, as it generally proved it not to have been so fully considered ; and commonly there was a disposition of the parties to give way to what the court thought equitable :

nor was there that opposition as in other cases.

There appears some little obscurity in this part of Lord *Hardwicke's* observations; the case alluded to by him seems to be, 2 *Roll. Abr.* 151. G. 2. where it is said, that, if a man lease land to another and his executors for the life of J. S., and *cestui qui vie* "die;" the executor shall be a special occupant, *he* taking, *there*, not *by representation* and *in right* of the testator, but in his *own right* as a person *described in the lease*. In allusion to which case his lordship argued that the terms, executors and administrators, in the case of *Burnet v. Holgrove*, were not used by the wife in the original will as words of limitation, (if I may be permitted the expression,) to *point out* the quantum of *interest* in the thing, which the second husband was to have; but as *a description* of the *identical* persons, *by their office* as *distinct* appointees, who were to take, *not in representation* of the husband, but in *lieu* of the husband; namely, the one *in failure* of the other. The argument is very ingenious, and seems not to be controvertible, as she *certainly* might have nominated *A.* to take; and, if he died before it vested, that then *B.* should take.

And

And as, in case of the execution of a power directed to be executed by *will*, all *incidents* and *contingencies* affecting a will, *attach* upon it; so also, if it be to be done by *deed*, that deed will likewise operate *precisely* in like manner when made *in execution of a power*, as when used for any other purpose.

Thus, where lands were conveyed to trustees, for such uses as *E.* should direct, limit, and appoint; *she*, voluntarily, by writing under her hand and seal, *limited* the uses to *H.*, and (she being a feme covert) the deed was kept in hers, or her husband's hands; *afterwards* she *destroyed* this deed, and limited the uses to *C.* and *A.*; there was no power of revocation reserved in the first deed. The question was, whether she was so bound by the first limitation, that it was not in her power to alter it? And the chancellor said that, though this was a case of value, yet there was no difficulty in it; for, where the power was once executed *by deed*, there being no power reserved thereby to revoke or alter it, a subsequent limitation by another deed would be void; for, the *first* deed and the *last* will always take place. If a power were reserved to limit a trust by deed or will, if it were once limited *by deed*, it could never afterwards be altered: but

Hatcher v:
Curtis et al.
2 Freem. 61.

a will being of its own nature revocable and alterable, it might be revoked or altered as the party pleased; for, trusts were governed by the rules of law, though the execution of them were only compellable in that court.

In the preceding case it was suggested by the court, that, if the power reserved were, "*to limit by deed, from time to time;*" then it might be limited and revoked *toties quoties*.

But, this point hath since received a contrary determination. Thus, where *A.* made a settlement, wherein was a power that he might, *from time to time*, by deed or writing under his hand and seal, revoke the uses thereof, and by *the same*, or *any other deed*, limit and declare new uses: *A.*, in pursuance of this power, revoked the old uses, and by the same deed limited new uses, without annexing any power of revocation to these new uses. *A.*, afterwards, thinking he had, by virtue of the first settlement, a power of revocation *toties quoties*, by *another deed* revoked the last uses, and, again declared *other uses* of the same lands; and, whether he had such power was the question?

Hele v. Bond,
Pre.Ch. 474.
et vid. Al-
lanfon v.
Clitherow,
1 Vez. 24.
1 Ventris
198.

It

It was agreed that he might, in the deed of revocation, have annexed a power of revoking the uses thereby declared, and that he might, *afterwards* have executed that power accordingly; but it was resolved that, in this case, there being no such *new power* of revocation *annexed* to the *new uses*, his *power of revocation* was *executed*, and *at an end*; and by consequence, that the revocation *afterwards* was *without any warrant*, and so the uses limited upon the first revocation must stand; and it was decreed accordingly, which decree was affirmed in the House of Peers.

However, this rule admits of an exception, where the person, that is the *object* in whose favor the power is created, takes under it *in respect* of a *particular character*; and by collateral events, *loses* that *character*; for he *ceases* thereby to have a *capacity* of taking under it.

Thus, where *D.* the father on his marriage, settled divers manors and lands to the use of himself for life; and *then* as to part thereof, to his wife for her jointure, remainder to trustees in trust, that if there should be both sons and daughters of the marriage, then the trustees were, within six months after his decease, to enter on all the premises not settled in jointure,

Chadwick v.
Doleman.
2 Vern. 528.

ture, and by the profits to raise 4000 *l.* for younger childrens portions, in such proportions as *D.* should appoint; and, in default of appointment, to be equally divided amongst them, remainder to first and other sons in tail.

There being several of the younger children of full age, *D.* in 1686, by deed appointed the 4000 *l.* in several proportions amongst his younger children, and particularly the sum of 2600 *l.* to *T.* his second son, who was of full age and under a treaty of marriage at that time. After this the eldest son, the brother of *T.*, died without issue, and *T.* by virtue of the settlement, as first son, became intitled to the whole estate; and thereupon, *D.* the father, made a new appointment of the 2600 *l.* amongst his other younger children; particularly 1600 *l.* part thereof to his daughter, who was plaintiff in this suit, and who, with her husband, filed a bill against *T.* and the heir of the surviving trustee, to have the 1600 *l.* raised. And the single question was, whether the first or last appointment should take place?

For *T.* it was insisted, that *D.* by the first appointment, had well executed his power by deed, without power of revocation, and at a proper time for the doing it; his younger children being grown up, of full age

age, in want to be advanced and put into the world; and T. particularly *at that time* under a *treaty of marriage*, capable of taking, and, by the appointment, having an interest *actually* vested in him, which, although an interest in a sum payable *in futuro*, and not to be raised until after the death of D., yet was such an interest as might be mortgaged, sold, or disposed of, by him for the support of his family; and which had been *in truth*, his subsistence for several years, there having been about the space of six years between the making the first appointment and the death of the elder brother; that an interest once vested was not easily to be divested; and that there was nothing in the settlement, which imported that, *after* an appointment made, it should divest, if a *younger son* happened to become *the eldest* and *heir* before the money became payable; that it was sufficient he was a younger son at the time of the appointment made, when the father thought fit to execute his power, who was the proper judge as well of the time, as of the manner and proportions; and, he having made an absolute appointment, without reserving any power of revocation, whereby an interest vested, it was not to be divested *without an express condition or proviso* for that purpose.

That as *T.* was a younger brother for near seven years after the appointment made, it might have happened that he might have been so for thirty or forty years, and might have spent his fortune; and it would have been hard to make him, *as heir*, refund what he had spent whilst a *younger son*, and whilst he had *no* benefit of the estate: and therefore, that the first appointment ought to stand.

The Lord Keeper *Cowper* admitted, that the defendant, *at the time* of the *appointment*, was a *person capable* to take, and was a *younger child* within the power of appointing; but was of opinion, that this was a *defeasable appointment*; not *from any power* of revoking, or, *upon the words* of the appointment, but *from the capacity* of the person. He was a person *capable* to take *at the time* of the appointment made, but that was *sub modo*, and upon a *tacit* and *implied* condition that he should not *afterwards* become the *eldest son* and *heir*, so that he had, as it were, only a *defeazable capacity* in him. And his lordship decreed in favor of the daughter.

And it was said by Lord *Cowper* in the preceding case, that, although the appointment
had

had been made *in consideration of marriage*, it would have been the same *thing*.

Though Lord *Cowper* seems to have taken a great latitude in the case of *Chadwick v. Doleman*, yet, on consideration, his lordship's will be found to have been a very reasonable construction, made to answer the intent of the parties, and to avoid inconveniences and absurdities ; and, agreeable to the general grounds of the court, in construing the words *younger children*, in which case a great latitude is taken to answer the intent. Lord *Cowper* went plainly upon this ground : he found it established, by the precedents and authorities of the court, that the words *younger children* had received a prodigious latitude of construction to answer the occasions of families and the intent of the parties ; an *eldest* daughter having often been construed to be a *younger* child ; that was carrying the words very much out of the natural into a foreign and remote sense, to answer the intent : and, he also found it determined, that an *only* daughter, though not younger in comparison with another, should be considered as a *younger* child, when a provision was made for *younger children*, and there was no other provision for a daughter but the estate limited to go over ; and that
there

there had been cases where a younger son; becoming an eldest, had, under certain circumstances, been considered as an eldest to exclude him from the benefit of the portion; and that the rule laid down by Lord Harcourt in *Beal v. Beal* had been, that younger children should be considered such, as did not take the estate, and were not the head and representative of the family. Lord Cowper, then, having found these points determined, from thence inferred a tacit condition, that the capacity of being a younger son should continue, until the time of payment came; and, upon that ground, made the determination preceding, though the father had actually executed the power: for, taking it abstractedly merely as an execution of a power, the decision could not possibly be maintained upon the general rules; the rule of law being, that if a power, given to be executed by deed, be once executed in the life of the party and no power of revocation reserved, it cannot be revoked and executed anew. But the foundation Lord Cowper went upon was, that the continuing of the capacity to the time of the provision taking effect in point of payment, was a tacit or implied condition going along with the appointment. And his lordship's determination was, afterwards, approved by Lord Talbot in the case of *Jermyn v. Fellows*,

Hele v. Bond.
Sup. 104.

v. *Fellows*, and by Lord *Hardwicke* in the case of Lord *Teynham v. Webb*, where his lordship carried *the same principle* to a direction under a power “for provision of younger children, *in default of appointment*,” his lordship holding that there could be *no difference* between the *one* and the *other*, the *objects* being the same.

Rep. Temp.
Talbot 93.
2 Vez. 198.

Secondly, as to the *form* of the instrument by which the power is executed.

And, under this head, it is observable that it is not necessary, that, where a power to appoint is reserved, the deed *creating* the power should be *recited*, or *referred* to, in the *instrument* by which it is executed, if the *act* done be of *such a nature*, as that it can have *no operation*, unless by *virtue of the power*; for, in such case, the law will refer to *that*, and, *thereby*, give validity to the instrument.

The first case I have met with in which this point came into discussion is *Clere's case*; there *H.* seized of three acres of land, each of equal value, held in capite, made a feoffment in fee of two of them to the use of his wife for her life, for her jointure; and afterwards made a feoffment by deed of the third acre,

Clere's case,
6 Co. 17.
S. C. Cro.
Eliz. 877.
Cro. Ja. 31.
Moore 567.
S. L. Ro-
common v.
Fowke supra
62.

acre, to the use of such person or persons, and of such estate and estates as he should limit and appoint by his last will in writing; afterwards he, by his last will in writing, devised the said third acre to one in fee under whom the plaintiff claimed. And whether this devise was good for all the said third acre, or not, or for two parts of it, or void for the whole was the question? And it was held, that when *H.* had conveyed two parts to the use of his wife by act executed, *he could not, as owner of the land, devise any part of the residue by his will, so that he had no power to devise any part thereof as owner of the land; therefore the devise ought of necessity to enure as a limitation of an use; or, otherwise, the devise would be utterly void, and judgment was given accordingly, which was affirmed on writ of error.*

Scrope's case,
10 Co. 143. b.
S. C. 2 Roll.
Abr. 263.
S. L. Snape
v. Turton.
Sir W. Jones
392.
S. C. cited
1 Will. 164.
Infra.

And the law is the same, if the power be to revoke a former limitation and to make a new settlement; a latter act, that cannot stand with the former uses, is construed a revocation though the deed creating the power be not recited or referred to: and therefore, according to the express words and vulgar sense, it would be no revocation thereof. Thus, where *S.* seised in fee of the manors of *K.* and *M.* and having
issue

issue *A.* by *W.* his wife, by indenture dated 26th *June* 23 *Eliz.* for the preferment of *W.* his wife and *A.* his daughter, covenanted with several to stand seised of the said manors to the use of the said *S. W.* and *A.* for their lives, and, afterwards, to the said *A.* and the heirs of her body, with other remainders over; with a proviso that, if the said *S.*, during his life, and after the debts paid mentioned in a schedule annexed to the indenture, should be disposed either to determine, disannul, change, alter, enlarge, diminish, or make void the uses or estates, or any of them, of the premises, or any part thereof; that *then* it should be lawful to and for the said *S.* at all times, at his pleasure, by his writing indented under his hand and seal subscribed in the presence of three witnesses, to determine, disannul, &c. And also by the same writing, at his will and pleasure, or by any other writing whatsoever, signed and subscribed as above, to limit, declare, and appoint the uses of the same to the persons abovementioned, or to any other persons, &c. *W.* died, and *S.* married *E.*; and, by indenture *ult. Novemb.* 33 *Eliz.* subscribed in the presence of three witnesses, in consideration of a jointure to be made to the said *E.*, covenanted with *C.* and *D.* to stand seised of the said manor of *H.* to the

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use

use of the said S. and E. for their lives; and, afterwards, to the use of the right heirs of the said S. &c. and other conveyances of the fee simple were afterwards made. And it was resolved by two Chief Justices and the Chief Baron, that, although, in this case, there was not any *express* signification of his purpose, or determination to determine, disannul, &c. yet, forasmuch as by the said indenture of 33 *Eliz.* he covenanted to stand seised to the use of himself and the said E. then his wife, and afterwards of his right heirs, it enured to two intents: First, To *declare* his purpose and determination to *determine, disannul, &c.* and, thereby, *ipso facto* the former uses *ceased*. And secondly, The covenant, in the same indenture, enured to raise a new use to the said S. and E. his wife and to the heirs of the said S. “*quia non refert an quis intentionem suam declaret verbis, an rebus ipsis, vel factis.*” And when he limited *new and other* uses, he thereby signified his purpose to determine and alter the uses *before limited*.

Gilmore v.
Harris,
3 Lev. 213.
S. C. Carth.
292. S. C.
Skin. 324.

So the execution of a power will be good, although the power itself be imperfectly recited. Thus, where *E. M.*, seised in fee, by lease and release, 27th, 28th *Feb.* 1675, conveyed the tenements in question to the use

use of himself for life, the remainder to trustees to preserve contingent remainders, remainder to his first and other sons and the heirs-male of their bodies successively, the remainder to *S. M.* and the heirs-male of his body, the remainder to the heirs-male of the body of Sir *S. M.* father of *E. M.*, remainder to the right heirs of *E. M.*; with power for *E. M.*, by deed ensealed, &c., to revoke the uses limited to *S. M.* and the heirs-male of his body, and to limit new uses: afterwards *E. M.*, 2d *March* in the same year, by deed reciting the deed of the 28th, *February*, and that he had *thereby* power to revoke all the uses limited to *S. M.* and his heirs-male (*omitting the words "of his body"*) revoked all the uses limited to *S. M.* and his heirs-male (*omitting the words "of his body,"* &c. again) and appointed the said estate in the said deed named to be to the said *S. M.* and his heirs-males: provided that the said *S. M.* paid to the wife of *E. M.* 400 *l.*, and 600 *l.* to his own executors, within six months after his death. *E. M.* died without issue, leaving *H.*, wife of the defendant, his daughter and heir. *S. M.* died without issue, leaving *F. M.* lessor of the plaintiff, his brother and heir. And the question was, whether the deed of the 2d *March* was a good revocation of that

of the 27th, and 28th *February*? And it was argued, and agreed by the court *unanimously*, that it was a good revocation *notwithstanding* the *omission* of the words “*of his body* ;” for, that the recital of the deed was right in the date, and in the names of the parties, and *then* the words, *heirs-male*, ought to be intended *such* heirs-male, as *were expressed* in the *deed* ; namely, heirs-male of the body.

Guy v. Dormer.
Sir T. Raym.
295.

N. B. This point happened not to be material, as the event of this case would have been the same, whether the revocation had been good or not.

And, although the uses be limited, in the deed creating them, to be revoked *by express words, in totidem verbis* ; yet any act irreconcilable with those uses will operate, *in law*, as a revocation. Therefore where *D.*, seised in fee of the lands in question, by indenture dated 25th, 26th *September* 7 *Car.* 2. conveyed the same to trustees and their heirs to certain uses therein mentioned ; in which indenture it was covenanted, agreed, and declared to be the intent and meaning thereof, that, if the said *D.* should, at any time thereafter, by any writing subscribed and sealed by him in the presence of two or more credible witnesses, “*in express words*,” signify and declare his intention to revoke or make void those presents, or the estate or use therein, or thereby limited to, &c. ; that *then*, and *from thenceforth*,

fortb, touching such of the said lands and premises whereof such declaration should be so made, the use and estate by those presents limited and granted should cease, determine, and be utterly void, any thing, &c. D., afterwards, viz. 9th April 20 Car. 2., made *his will* in writing, signed and sealed in the presence of two credible witnesses, by which he *gave and devised the lands*, contained in the indenture of the 26th September 7 Car. 2., to different persons, and for different estates than those limited therein. And the question was, whether *the devise* was a revocation of the uses in the indenture? And it was contended that the will was no revocation of the uses, because the words "*by express words*" excluded all *implied* revocations; for, that every revocation must pursue the power. But, it was argued on the other side, that the interpretation of powers of revocation had been always favorable, because estates of inheritance depended thereupon. That *here* the will was a revocation, because when *two acts* could not *consist*, the *latter* was a *revocation* of the *former*. In some things a donor or feoffor should bind a power to circumstances, as for a deed to be executed before three witnesses, &c.: but, when there was only a *general* expression, the *latter act*

should satisfy those *general* words; and judgment was afterwards given, that the power of revocation was well executed.

But, although a man may execute a power of appointment, or revocation, without particularly reciting or referring to the deed creating the power, yet the *instrument* by which the power is executed must have reference, *on the face of it*, to, or mention, the estate on which it is to operate: and *the want of such reference cannot be supplied by parol*. Thus, where C. devised the income and produce of 1000 *l. South-sea* stock to F. for life, and gave him a power to dispose of 400 *l.* thereof to a charity. F. made his will, and, thereby, gave several legacies, and then devised the *rest* and *residue* of his personal estate amongst his nearest relations: the question was, whether this 400 *l.* passed by that devise of the *residue*, and whether that was a *good execution* of the power? *Parol evidence* was offered to prove, that it was the intent of F. that the 400 *l.* should be disposed of by his will, but it was not allowed by the Master of the Rolls: and his Honor held, that *this was not* an execution of the power, but that the 400 *l.* must go over according to the will of the first testator.

Moulton v.
Hutchinson,
1 Atk. 559.
659. S. C.
2 Eq. Ca.
Abr. Note 2.
Et vid. ex
parte Caswall
1 Atk. 559.
S. C. Inf.
121,

It is sufficient, however, that the estate, subjected to the power, be referred to *in terms* which *include it* with the other property of the testator, although it be not *particularized*.

Thus, where one, by his marriage-settlement, had a power to charge an estate with 2000*l.* after the death of his wife, and a term of years was raised for that purpose; the husband made a will in these words, *First, "I charge all my real estate :"* and it was held by Lord *Hardwicke*, that, if a man had a power to charge an estate, it was not necessary in the execution of it, that he should refer to the deed out of which the power arose; for, in a court of equity, it was enough that his intent appeared; and if, in the execution, he sufficiently described the estates he had a power to charge, the estate would be certainly bound, *especially where the person charging was a purchaser of the power*. And his lordship held that the power was well executed.

Probert v.
Morgan and
Clifford,
1 Atk. 441.

But, if an estate be conveyed and a power created, and the effect of the conveyance be to *revest* the estate, *subjected* to the power, in the *person* who is to execute

the power, so that he become *seised* thereof, till *declaration and limitation* thereof be made *according to the power* ; and he execute a conveyance mentioning the estate, and creating an interest therein that may take effect, *either out of the legal estate* that resulted, or, *by virtue of the power indifferently* ; in such case, if the deed, creating the power, be not *recited or referred to*, the instrument will operate upon his *interest* and *not* upon his *power*. And, accordingly, it was determined in Sir *Edward Clere's* case ; First, That, if a man, seised of lands in fee, made a feoffment to the use of such person and persons, and of such estate and estates, as he should appoint by his will, by operation of law, the use did vest in the feoffor, and he was seised of a qualified fee ; that was to say, *till declaration and limitation were made according to his power*. Secondly, That if, in such case, the feoffor, by his will, limited estates "*according to his power reserved to him on the feoffment,*" there the estate should take effect by force of the feoffment, and the use was directed by the will ; so that, in such case, the will was but *declaratory* : but if, in such case, the feoffor, by his will in writing, devised the land itself, as owner of the land, without any reference to his authority, there it should

6 Co. 17, b.
et vid. sup.
Litt: fol. 109,
2.
Et vide King
v. Melling,
1 Vent. 225,
as to this
Point.

should pass by the will; for, the testator had *an estate* deviseable in him, and *power also* to limit an use, and he had an election to pursue which of them he chose; and *when* he devised the *land itself* without any reference to his authority or power, he declared his intent, to devise *an estate* by his *will*, as *owner* of the land; and *not* to limit *an use*, according to his authority.

Again, where C. surrendered a copyhold estate, lying in the manor of *Woodford* in *Essex*, to B. and another to the use of the wife of C. for life, and, after his death, to pay the rents and profits to all her children equally, and *then* in trust to such use or uses as C. should, by deed or will appoint, and, for want of such appointment, then to his son J. C. and his heirs. The wife died, and then C. made his will duly executed, in which there was the following clause: "as to all the rest, residue and remainder of my effects, real and personal, of what nature, kind, or quality soever, I give to my son G. C. in full bar and satisfaction of what he may claim by virtue of the custom of *London*, or otherwise. The testator died soon afterwards. J. C. had become a bankrupt, and was dead, at the time of making

Ex parte
Caswal,
1 Atk. Rep.
559.

making the will, and his assignees had got possession of the estate, which was the subject of the power. A petition was therefore preferred to the Chancellor by G. C., praying, that the assignee of J. C. might take a proper conveyance of these lands at *Woodford* from the 'commissioners, and might, thereupon, duely surrender them to the petitioner and his heirs, or, as he should appoint. The event of this petition depended upon the question, whether C. had, *by his will*, made a *proper appointment* to the petitioner pursuant to the power?

And, upon this part of the case, the Lord Chancellor observed, that, what a court in a judicial way might do was another matter, but, in this summary way, as he was at present advised, he was of opinion it was not a good execution of the power. The material thing was, the limitation over of the copyhold in the surrender; what was the effect of that? why there was an estate actually vested in J. C. and nothing but an appointment executed could divest it out of him; and this would have been the construction if it had been a legal estate; and, though it was a trust-estate, yet, in that court, it ought to be considered and construed in the same manner: and, therefore, it was no
more

more than an *estate* for life to C., remainder in fee to J. C., subject to be defeated and opened on a proper appointment by C. Though a man might execute a power without reciting it, or taking the least notice of the power, yet, it was necessary he should mention the estate which he disposed of, and he must do such an act, as shewed that he took notice of the thing which he had a power to dispose of. C. had *other lands* on which the devise to G. C. might be satisfied. Here was nothing that was at all descriptive of the thing which C. had a power to dispose of, but what was *applicable* to other estates of which he was seised, and of which he could equally dispose.

And if, upon view of the instrument by which the power is contended to have been executed, the intention stands in equilibrio: as if it be so framed, that, whether it be determined to be a good execution of his power, or not, yet the deed *by which* the power was *executed* must be *in part* invalid; in such case the limitation will take effect out of *the interest* of the donee of the power, and not out of *the power*.

Upon this principle alone the following case is reconcileable with the fourth resolution

Brown v.
Taylor.
Cro. Car, 38.

tion in Sir *Edward Clere's* case. In the case alluded to, *H.*, seised of tenements holden by Knights Service, *anno* 21 *Jac.* infeoffed certain persons to the use of himself for life, and, after his decease, to the use of such person or persons as he should appoint by his will, for such interests, or otherwise, as in his said will should be specified. Afterwards he made his will, and, thereby, devised that all his tenants of his farms should enjoy their tenements for 21 years after his decease, and that *R. T.* should have the rent out of his land for his life, payable at two feasts of the year; and devised to his wife all his land in *S.* for her life: and the question was, whether this were a good declaration of the uses, to limit it to his wife, so that she should take it by the feoffment; or, whether she should take it by the immediate devise; for, in the latter event, the will would be void for a third part, because the lands were holden in capite? and, after argument at the bar, (without any at the bench,) *Hutton Harry* and *Yelverton* agreed, that they should take by the devise and not by declaration of uses. For, they held, that, after a feoffment in this manner, the feoffor had a *qualified fee* in him, as owner, so as that he might make his will of those lands and devise the rent as owner thereof; and then the land, being held by
Knights

Knights Service, the *devise* was void for a *third part*; or, he might declare his will, as *upon the feoffment*, which should enure as a *declaration* of the uses upon the feoffment, and then *all* the land passed. So that here, when he made *this will* without reference to the feoffment, the law would construe it as the *will* of one who was *owner* and might dispose of it as owner, and *not* as a declaration of the uses, which was an authority only: *also the will appointed rents to be paid*, which was a good will and devise; but the authority *limited him*, that he might *not* appoint *any rents* to be paid. And to have it to be a will for one part, and to dispose as by authority for another part, could not be good in law: and therefore it should be adjudged as a *will* to enure for both; but *Croke* doubted thereof, and conceived that it might well be construed as a declaration, and, *thereby*, it should be a good limitation for all the lands; and he thought that, by the same authority, he might dispose of the rent out of the land; and *his declaring that his tenants should hold their farms for twenty-one years after his decease* could not be but *by declaration*; and it was more for the advantage of the parties, that it should be so construed; and he said that the law should expound for the greatest benefit of the parties, when, by any construction, it might

might be so done : and that, by this means, all the parts of the will might take effect. But, the three other Justices held, that he could *not* dispose of *the rent*, by the said words, but, of *the estate* of the land *only*; wherefore, without any argument, they adjudged for the plaintiff.

And, where the effect of the power is to enable the person, in whose favor it is created, to charge an estate with a certain sum, the *rule of law* is the *same*; namely, if the charge may possibly take effect out of the *interest* of the donee of the power in the estate charged, it shall do so; *even* though such interest of the person, *having* both a *power* and *legal estate*, may, *eventually*, prove *insufficient* to answer the charge he makes upon it.

Hard. 395.
1, Ca. Ch.
103. but most
accurately re-
ported 1 Lev.
150.

Thus, in the case of *Jenkins v. Keymis*, where K. (tenant for life, remainder to his son C. K. in general tail, with remainder over,) upon the marriage of C. K. with B. in consideration of the marriage and 2500*l.* portion, levied a fine and suffered a recovery to the use of himself for life, remainder to C. K. and the heirs of his body upon B. begotten, remainder to the heirs of the body of C. K. remainder over; *with power to himself; by deed in writing, to charge all and singular the premises with payment of 2000 l. : K. and*
C. K.

C. K., afterwards, *without* reciting the power, by lease and release for 2000 *l.* conveyed part thereof to D. and his heirs, upon condition to be void upon payment of 160 *l.* at the end of the first year, and 160 *l.* *per annum* for nine years afterwards, (being the interest) with the 2000 *l.*; or the 2000 *l.* and interest at the end of any year after the first year. K. died, then B. died, and C. K. married a second wife, by whom he had issue the defendant in the cause, and then he died. The money not being paid, the son and heir of D., D. being dead, brought an ejectment; and one point argued thereupon was, whether the conveyance by lease and release *under the circumstances of this case*, was a good execution of the power, for it was admitted that, abstractedly, it would have been so, *notwithstanding that C. K. joined* in the conveyance. But, the question made was, whether this conveyance of a fee redeemable upon payment, not only of the two thousand pounds, but also of interest for a year certain, and for more years, if it were not paid at the end of the first year, was good; or, if it were not good for the interest, whether it would be so for the 2000 *l.*? for, it was said, that, when a man executed *all* his power and *more*, it would be good for *that* which was *within his power*,
and

and *void* for the *residue*. But, on this point, *Hale*, Chief Justice, and the court held, that this was not a good execution of the power; for, by this means all the estates might be charged with a great sum of money, which would totally defeat the settlement; and that the power was *entire*, and *so* should *the execution* be; and that it could not be made *good* for part and *void* for the residue *at law*. But *Hales*, said that, perhaps, there might be *an equitable ground* to aid the execution as to the 2000 *l*. And, thereupon, judgment was given for the defendant.

1 Lev. 152.

The plaintiff, afterwards, filed a bill in chancery, *Pasch. 20 Car. 2.* before Lord *Bridgman*, to have the defect in the execution of the power supplied there; but the court refused relief: and his lordship held that, *C.K.* joining with *K.* in the conveyance to *D.*, *which conveyance* did not *recite* the power, the said *deed* could *not* be construed to be made *in execution* of the power, but *as owners* of the estate; and, *upon that ground*, he denied relief.

But, it is stated in the report of this case (1 *Chan. Ca.* 105.) that, in truth, it appeared, although it was not found in the special verdict, that *K. did*, after the mortgage to the plaintiff's father, *in pursuance* of his power, charge

charge the premises with 2000*l.* debts which he owed : which debts the defendant's father paid accordingly ; which *fact* clearly *rebutted* the presumption that the mortgage deed *was intended as an execution* of the power, and of course, rendered the *conclusion* that K. and C. K. *meant* it to take effect *out of* their *interest*, necessary.

4thly. With relation to the circumstances required to attend the execution of powers, which will include the consideration of the *nature* of the *act*, to be affected by the execution of the power ; and of the *relative situations* of the donee and appointee under a power.

This branch of our subject, so far as it relates to the circumstances required in the execution of powers, may be ranged under two distinct heads ; namely, *external* and *instrumental* circumstances.

External circumstances are such as have their existence *dehors* the instrument by which the power is executed and are collateral to it. As in cases where powers of revocation are limited, to take effect upon tender of money, &c.

Instrumental circumstances are those which immediately relate to, or are required to appear

K
pear

pear upon the face of the instrument *itself* by which the power is executed, as writing, sealing, witnessing, &c.

Scrope's case
1 Co. 144.
Kibbet v. Lee
Hob. 312,
supra 58.

And with respect to circumstances, whether external or internal, the rule, both in law and equity, is, that all *incidental* circumstances prescribed in the creation of powers as to *consent* of *third persons*, *subscription* of *the instrument*, *witnesses*, &c. must be *strictly* observed.

Sympson v.
Hornby.
Pre. Ch.
452.

Thus, where a testator gave his estate to such uses as his wife, *with* the *consent* of his trustees, should direct; and the wife had taken upon herself to dispose thereof by her will *without* any such *consent*: the disposition was held to be void, and the original testator was considered, *as to that*, as dying intestate *ab initio*.

3 Chan.
Ca. 107, 108.
S. C. infra.

And the *rule* is the same, although the power be reserved to be executed by the owner of the estate subjected thereto. This was one point agitated in the case of *Bath* and *Montague*; for it was there contended, that, if a man made a feoffment to uses with power of revocation under particular circumstances, and made a revocation, wherein *all* the circumstances were *not* observed; he was *such* an owner of the estate, as that *equity* would

would *support* the disposition. But the great personages that sat in judgment on that cause *denied* that the law was so. And Lord *Holt*, in arguing *that* part of the case, said, that, to admit it would be to set up *equity* in *direct* opposition to the law; for, when a man had restrained himself by a *particular* power, and had no *legal right* to dispose of his estate but by *exactly* pursuing that power, *equity* could *not* enlarge that right or power. It was *clear* that, in *law*, he could *not* execute it otherwise; for, *if* he could, *then* there was no reason for imploring the aid of a court of equity. And there was, the *greatest reason*, in *this case*, that a man should be obliged by the rule of law in a court of equity, because it was a law that *he* had put upon himself: and that was *the equity* of the legal obligation, namely, because it was supposed to be *made* by his own *express* or *implied* consent. Here was a man that had made a deed whereby *he* had *actually* restrained himself from disposing of his estate, but in *such* or *such* a way. By the same reason that they, in a court of equity, might construe it a *good* execution of the power where the circumstances were *not strictly* observed, they might allow a man to *revoke* a *voluntary* settlement, where there was no power reserved to him in the deed so to do; and *that*, he

took it, no one would be so hardy as to affirm. If a man *voluntarily* made a settlement to the use of himself for life, and after to other uses, and reserved no power of revocation, he could not revoke this, *no*, not in *equity*; and the reason was the same *as to a power* reserved; for he had no *other* right to do it *but* by virtue of the power, and it was as if he did it *without* a power, unless he made a due use of such a power as he had.

His lordship said, that it would be manifestly inconvenient, if a court of *equity* had such a *latitude* in powers of revocation; for, it was not sufficient to say, it was *unreasonable* that a man *should* be restrained, when a man *would* restrain himself; nor did he see what reason there was to say, that it was imprudent. Indeed to argue *thus*, was to make a man *less proprietary* of his estate, than *the law* had made him, it was to say, that *he* should not settle his estate in such manner as he *pleased* to order for *himself*. A man at this rate was never master of his estate: a man made such settlement *as owner*, and it was *no matter* whether he had a *reason* for making it so or no, *stet pro ratione voluntas*; but, *then*, when he had *so* done, both *law* and *reason* bound him to observe it, and there

was

was *no* reason for a court of equity to avoid it. He must confess, courts of equity would have enough to do, if they were to examine into the *wisdom* and *prudence* of men in *disposing of their estates*, and if the *disposition* were not discreetly, but *foolishly* made, *therefore* to set them aside: there would need more courts of Chancery than there were to dispatch the business of equity in that point. But, were a man *wise* or *unwise*, if *he* were *legally compos mentis*, he was the *disposer* of his own property, and, though he did not dispose of it *so* discreetly as a judge or a great lawyer would do, there was no reason that *equity* should interpose to alter it.

Besides, there might be a very good reason for a man to put such restraint upon himself, and for a *wise* man to do it too; for, a man might know the frailty of his own temper, how apt he might be to be surprised, and prevailed upon to make a precipitate or inconvenient will, settlement, or disposition of his estate. Then, to restrain this infirmity which he was conscious of, and *to prevent* an inconveniency that might arise by his disposing of his estate upon a surprize, *he* would *restrain himself* and settle his estate *so* and *so*, that, if there were

a *deliberate* intention in him to alter it, he might *solemnly* execute such intention; he would, *therefore*, have *so many* witnesses, and *those* of good quality, that, if they found him about any such action, might advise him in it, and prevent any *apparent* surprize into the doing of any action that might be foolish, rash, or prejudicial. For that reason he would bind himself under *such* and *such* restraints. And when a court saw a thing done that *might* have a good reason given for it, as there might be for this circumscribed power, namely, to restrain from *rash sudden* actions, it *was* to be *presumed* that it was done upon good reason; and, therefore, the pretended unreasonableness of *setting* the owner of an estate *by himself*, mentioned at the bar, was *no* argument: for it might be (and that was rather to be presumed) upon *very good reason*, rather than upon *no* reason at all.

His lordship further said, that a contrary construction would introduce many absurdities; for, first, it would be to set up a power in a court of *equity*, in direct opposition to the courts of *law*, and *so* to let a man lose, *in equity*, for *no* other reason, but, *because* he had *restrained* himself *at law* by a law of his *own* making; secondly, It would be

be as much as to say, that, because a man might *dispose* of his estate *one way* by law, therefore, *in a court of equity*, he should *dispose* of his estate *any way*. That was a very strange, but a true, consequence of this doctrine, that, because a man settled his estate *such* a way with *such* a power to alter it in *such* circumstances, therefore he should do it in *any way*. At this rate, tenant in tail might dispose of his estate without a fine, *in equity*, because he might have done it, *at law*, with a *fine* ; for, *there was the same equity in both cases*. So, a copyholder of inheritance might, *in equity*, dispose of his estate *without* a surrender, because he might do it, *at law*, by a surrender. Thirdly, It would be to enable a man to give away more than he had in him ; for, he had *no more* in him than *according* to the power reserved to himself. Fourthly, It would be to *frustrate* the intent and design of *all* settlements whatsoever. So that his lordship thought, upon the whole, that there was *no reason* at all for *a court of equity* to let a man *loose*, that had *thus* restrained himself, unless there were some *special* reason in the *particular* case, for the sake of which a man ought to have his case vary from the ordinary rules.

Sir T. Gre-
sham's Case,
1 Leon. 89.
S. C. Moor
261. 429.
same point,
Dyer 372, a.
pl. 9.

Thus, where G., being seized of the manors of *W.* and *M.* in the county of *N.*, enfeoffed *B.* and *C.* in 12 *Eliz.* to certain uses, with clause of revocation upon the tender of 40 s., and that, after such revocation, he might limit to new uses. And, the year following, G. made the like conveyance of his lands in the county of *S.* to the said persons, to the like uses, upon like clause of revocation, upon the tender of 40 s. G., afterwards, tendered to the said feoffees *one sum* of forty shillings, to revoke the uses raised upon *both* the feoffments; and *then* raised divers uses of divers parts of the said manors held *in capite*, and then died. And upon the question, whether the uses of the deed of 12 *Eliz.* were well revoked? It was resolved, by the opinion of the justices, that, by *that* tender, they were *not* revoked, but that the revocation was *utterly* void; for, two several sums of forty shillings ought to have been tendered, because they were several indentures, and could not be satisfied with *one* sum.

Arundel v.
Philpot, cit-
ed, 3 Ch.
Ca. 70.

So, in the case of *Arundel* and *Philpot*, where *M. P.* being a widow, seized of lands, made a settlement, with a power of revocation upon tender of a guinea, and she afterwards made another settlement, but there was *no* proof of
the

the tender of the guinea. The claimant, under the latter settlement, could not prevail upon a bill in Chancery to set aside the first settlement, suggesting her intention to revoke, but was dismiss'd to law, and ordered to try the title within a twelvemonth, whether revoked or not revoked. There was afterwards a trial, and the tender of a guinea was proved, so the power was well executed at law. But the *court of Chancery* would not *interpose* to support the revocation *in equity*, upon the intention *only*, without a proof of the *due* execution.

Again, where certain estates were, on the marriage of *F.* with *M.*, conveyed and settled to certain uses therein particularly mentioned, with a power to *F.*, at any time during the joint lives of him and *M.* his wife, by his last will, or any writing purporting to be his last will, under his *band* and *seal*, attested by three or more credible witnesses, (if he should die before his wife, without any issue between them then living) to charge the premises with any sum or sums not exceeding 2000*l.*, to be paid to such persons, and in such portions, as he should appoint; with the like power to *M.*, if she should die without issue in the life of her husband *F.*: there was no issue of the marriage. *F.* the husband,

Dormer v.
Thurland,
2 Will. 506.

band, by his last will in writing under his hand attested by three witnesses, *but not sealed*, reciting his power of charging the premises with the 2000 *l.*, disposed of the same to *D.* and others (being his relations) in the proportions therein mentioned. And one question was, whether this will, *not being sealed*, was a good appointment of the 2000 *l.*, within the power?

It was contended, in support of the will, that, *being a will of land* made according to the statute, it was a good execution of the power, and an effectual charge of the 2000 *l.* upon the estate, though *not under seal*. That the power to charge was in the disjunctive, either by will or by writing purporting to be a will: then, as to the power to charge the land by will, there was no need to guard that, the act of parliament having done it by directing, first, That it must be in writing; secondly, That it must be signed by the party; and thirdly, That it must be subscribed by three witnesses, which circumstances had all been complied with; and that there was *no* need of a *seal* to a will: then, as to the other part of the disjunctive, *viz.* “any writing purporting to be a will,” it was plain that there might be a writing purporting to be a will, which yet might not be

be a good will as to lands ; as where there were three witnesses to a will, but they did not *subscribe* their names *in the presence* of the testator ; now this would be a writing purporting to be a will, though it would not be a will *strictly* and according to the statute of frauds ; and yet it would be good, *pursuant* to the power, because attested by three witnesses though *not subscribed* by the testator in the presence of three witnesses ; and if the power could bear this construction, it would be reasonable to understand it accordingly, in a case where the testator must be admitted to have had this power, and to have *intended* to execute it, since he *recited* this *very power* in his will ; and it being in case of a will, which was the most favored of any conveyance, where, if counsel had been advised with, they would not have directed the testator to have put a seal to the will, it would be very hard that the *plain intention* of the party should be overturned by the omission of so slight a circumstance : wherefore, this power being capable of such construction, the court would understand it so as to make the charge effectual ; and there was *no* necessity to apply to Chancery to help an omission, the latter words, which required the seal, not refering to the will, but

but *only* to a writing purporting to be a will.

On the other side it was contended, that, as this was a voluntary charge, not for any wife or children, but for legatees, if it had not pursued the circumstances which the party confined himself to and prescribed, as it would be void at law, so there would be no reason to aid it in equity. That, the latter words, *requiring a seal*, referred as much to the will as to the writing purporting to be a will, and it was *as necessary* that this instrument, by which the 2000 *l.* was to be charged upon the estate, should have a seal, as that it should be attested by three witnesses; for, the sentence was not complete until the end, which declared the circumstances required to execute the power: Also the principal case could not be intended of a will or devise of lands, for *that* must be supposed where a man, *having lands*, devised them, but *here* the testator was *only* tenant for life; and the will or writing purporting to be a will, must, singly and alone, operate upon the power. *Et per curiam.* This *will* seems to be a good one, and being so, to be a good charge: the power was in the disjunctive, First, In respect of the husband who could make a will; and, Secondly,

condly, In respect of the wife, who could not make a will, but only a writing purporting to be a will. But the court directed, that, for the satisfaction of both parties, as it was a matter of law it should be referred to the judges of the King's Bench. And it was *by them* determined, on argument, that the *will* was *void*, as a charge, *for want of being sealed*.

In the preceding case, we may remark, that *the ground* upon which the chancellor was inclined to think the power *well* executed, was, that the requisition of sealing did not affect the first part of the sentence creating the power, namely, that part which enabled *F.* to charge the estate by his last will, but was confined to the *latter* part of the sentence which enabled the wife to make a similar charge; the reason suggested for which construction is, that *the wife* could *not* make a will, though she might make a writing purporting to be a will. But, if we consider the terms in which the power was conceived, this will be found to be a very forced construction; for, the power to charge by *writing*, purporting to be a will, is applied *first* to the *husband*, and *afterwards* repeated in favor of the wife; and, *therefore*, there seems to have been no pretence,
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in this case, to consider these *two modes* of executing the power as referable to the *two persons* respectively, who were to execute it; and if this be so, then *there* can be no doubt but that the latter words in the clause, *viz.* “under his hand and seal attested, &c.” are referable as well to the will as to the other writing. And this is clear, both from the intention of the parties, and the reason of the thing. The words are, “with a power to F. at any time during the joint lives of him and M. his wife, by his last will or any writing purporting to be his last will, under his hand and seal, attested by three or more credible witnesses,” which is *one* intire sentence, and, being so, the words are naturally referable to both instruments. The reason of framing it so was to give the donees of the power a greater latitude than the words, “last will,” only would have done, and the words, “under his hand and seal attested by three or more credible witnesses,” are as proper to a will as to any other writing; for, though sealing be not a necessary circumstance to the validity of a will, it is an usual one.

Lord *Hardwicke*, accordingly, in a case which came before him, the circumstances of which were nearly similar to those in the preceding one,

one, approved the *principle* of *that* decision, and determined accordingly. The case I allude to is that of *Rofs v. Ewer*. There, a sum of money to which *A.* was intitled, was vested, previous to her marriage, in trustees upon certain trusts; and, in the indenture declaring the same, there was a clause, that, in case of no children living at the death of *A.* she dying in the life of her husband, then the trustees were to transfer a moiety of the said trust money “unto such person or persons, and to and for such uses, intents, and purposes, and, in such manner as *A.* should, in and by her *last will* and *testament* in writing, or other writing under *her hand* and *seal*, to be *attested* by *two* or *more* credible witnesses, notwithstanding her intended coverture, limit, &c.” Afterwards *A.* died, living her husband, and, on the day she died, a paper in her hand writing was found in her closet, but not signed by her or attested by witnesses, the tenor of which was as follows, *viz.*

Rofs v. Ewer.
3 Atk. 156.

I declare this my will,

To sister Eliz ^h Taylor	£ 100.
To sister Sarah Rofs	£ 100.
To her son Alexander Rofs	£ 400.

And

And containing, in like manner and form, other legacies to several other persons to the amount of 1240 l.

And the question, on this case, was, whether *this memorandum* was a *sufficient* appointment within the power?

It was contended, in support of the appointment, that the words *or other writing*, separated the sentence, as "*or*" was, in its natural signification, a disjunctive. That there was no instance of courts of law or equity construing "*or*" a copulative, except when the intention of the party required it; but it was never *so* construed as to destroy an intention, or to defeat the execution of a power. That, therefore, from the words of the power themselves, it was fair to insist, that a *will* in writing, *unattested* by witnesses, was a good appointment within the meaning of this power; as *witnesses* were not *necessary* to a will of personal estate, though they were to a deed, to which the drawer of this settlement had properly confined it. That, supposing there was any doubt in the clause, yet, in support of the execution of a power, there ought to be a favorable construction; for, though they
were

were formerly taken strictly, yet latterly they were more liberally expounded. That *A.* having reserved this money to herself, had an absolute power to dispose of it as she thought fit, and might have given it away absolutely or upon terms. That she was, by this power, made in the nature of a feme sole, and, as such a disposition, in that case, would have been good, why not in this? *Sed per Lord Hardwicke*, the question was, whether as a *will* or *paper writing*, the solemnity of *sealing* and *attesting* were necessary to both. He was of opinion the latter words in the clause, *under her hand and seal, &c.* were referable *as well* to the *will* as to the *other writing*. First, upon the intention of the parties themselves, and from the reason of the thing. That, “ *then* in trust to transfer the moiety unto such person, &c. as the said *Ann* should, in and by her last will and testament in writing, *or* other writing under her hand and seal to be attested, &c. limit, appoint, and declare, &c.” was one intire sentence, and, being so, the words were naturally referable to both. Therefore the observations on the word “ *or* ” being a disjunctive, were not material in this case. The meaning of framing it in this manner, was, to give *A.* a greater latitude than the words *will in writing* only would

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have

have done. These words, "*to be attested,*" were *as proper* to a *will*, as to any other writing. Then, if this clause had been stopped, there would have been a comma after the word "*writing*" and another comma after the words "*other writing,*" and the next words, by this means, would, *according to grammatical construction*, relate *clearly* to them *both*. His lordship did not deny the words might be construed in another sense, but they would *then* be much more strained. He took it that the fettering and circumscribing powers of this kind arose from jealousies on both sides. First, on the side of the next of kin, that the husband might have such influence over her, as to prevail upon her to do some act to dispose of this money, which would prevent their having the benefit of it: Secondly, the husband might apprehend, that there might be some undue methods used by her near relations, to surprize her into an act which might deprive him of the advantage he expected from her fortune. Then, this intention was the most rational; for, in the execution of a power, every sensible person would chuse to annex such circumstances to it. The case of *Dormer v. Tburland*, was a much stronger case than the present. And, in that, Lord Chancellor *King* would not
 3 dispense

Supra 137.

dispense with *sealing*, although not necessary to a will, it being *a circumstance required by the power* in that case. That, in this case, although there was no instrument that required so little ceremony as a will of personal estate, yet, *to reject so material* a part of the power, provided as a necessary caution in the deed in order to prevent a disposition by surprize or undue means, was what this court could *not* warrant; therefore *he* ought *not* to *dispense* with these circumstances in the execution of the power; for, if this should be construed *not* to refer to a will, the husband might *as well* have allowed her to dispose of it without any restriction at all.

It is *observable* upon the two preceding cases, that no question was made, but that, if the formal circumstances required in execution of the power, were *referable* to both the instruments, *they* must have been complied with; for, in the consideration of these cases, the question is not, whether *the instrument*, by which the power is executed, be *in itself* sufficient, as an independant conveyance, to *carry* the estate or interest which is the *subject matter* on which the power is to operate; but, whether it be *that* instrument which the author of the power, (who,

as owner of the estate, had a right to annex any forms that he pleased, however arbitrary, to the execution of it,) *meant* and *intended* in the *creation* of it. For, if it be not *that* instrument which *be required*, the claimant under the power can have *no* title, unless he shews some *equitable* ground upon which *these* circumstances ought to be *dispensed* with ; as, if the power does not take effect, and the creator of it makes no further disposition of his estate, the claim of the heir at law or personal representative comes in, whose titles are compleat, and, therefore, must in this, as in every other case of imperfect assurances, take place.

Therefore, if there be two persons claiming under a power, and they be *both* volunteers, he whose title has any *defect* in circumstances will be without remedy *in equity*. Thus, where the Duke of *Albemarle*, in 1675, made his will, and, *thereby*, gave great part of his estate to the Earl of *Bath*. And, in 1681, he made a deed of settlement, wherein he mentioned his intent to confirm his said will, but, in limiting of his estate, varied in many particulars from it, but settled the greatest part of his estate upon the Earl of *Bath*. In this settlement there was a power of revocation by any deed or writing,

Duchess of
Albemarle v.
Earl of Bath.
2 Freem.

193.

3 Ch. Ca. 55.

writing, to be executed in the presence of six or more credible witnesses, three whereof were to be peers of the realm. In 1687, His Grace made another will, attested by *three* witnesses, whereby he revoked this settlement, and, thereby, gave a great part of his estate to Mr. *Monk*. After the duke's death Mr. *Monk* brought a bill to set aside the settlement, and to set up the last will. And it was insisted, on behalf of *Monk*, that, although this might not be a revocation in strictness of law, by reason the circumstances were not pursued either in the *number* or *quality* of the witnesses; yet, as this will was made with great deliberation, (it being in proof that the draught was not compleated until six months after instructions given for it, and that Lord Chief Justice *Pollexfen*'s opinion was taken upon it,) this will ought to be an effectual revocation in equity, although the circumstances prescribed were not strictly pursued; for, they were *only* to prevent surprize, and it was evident that there was none in this case. But, it was held by the Lord Keeper, the two Chief Justices, and Baron *Powell*, that the latter will was no revocation of the former settlement, either in law or equity; for, in all cases of settlements and revocations, *merely voluntary*, all circumstances ought to

be pursued: and there was no precedent of any case, in equity, where *the court* had given *any aid* where both parties were *volunteers*.

I have not, in my researches on this subject, met with any case or resolution that in any degree contravenes this position, as to the necessity of an *exact* compliance with the circumstances required to attend the execution of powers, when it is in favor of volunteers. There is indeed a *dictum* to this purpose; but, as it was irrelevant to the case in question, which was that of a strict execution of a power, and as it is contrary to the uniform course of decided cases, it cannot be considered as law. I allude here to the second position put by the chancellor in the case of *Sayle v. Freeland*. In that case *A.*, seized in fee of the premises in question, made a settlement in 1651, whereby he entailed the estate. But, in the deed, there was a power of revocation by any writing published under his hand and seal *in the presence* of three witnesses. *A.* soon afterwards made a will under his hand and seal, wherein he recited his power, and declared that he revoked the settlement, and this will had but two witnesses who subscribed their names, though a third was present. Then *A.* died,
and

Sayle v.
Freeland.
2 Vent. 350.
S. C. 2 Ch.
Rep. 110.
1 E. Ca.
Abr. 345.

and the lands descended to *B.*, son of *A.*, who made a mortgage. On a bill brought against the children of *B.*, who claimed, under the settlement of 1651, as tenants in tail, the question was, if the power were well executed, one of the witnesses not having signed? and the lord chancellor was of opinion that it was; for, first, here was an execution of the power in *strictness*, though the third witness did not subscribe. Secondly, his lordship said, that, if there had not, *equity would help it in such a little circumstance, when the owner of the estate had fully declared his intention to execute the power.*

But the Master of the Rolls, in the case of *Fitzgerald v. Lord Falconberge*, said, that the position, as stated here, was going too far, unless there was some equitable circumstance in the case; for, it was contrary to what was resolved in *Bath v. Montague*. Fitzgib.
220.

I have been the more particular on this point, in order to prevent the errors that we should fall into in our conclusions on questions of law respecting this subject, if we were to take into our consideration the validity of the instrument, by which a power is executed, as an *independant* or *distinct*

Cowper 267,
268.

conveyance to carry that which is the subject of the power; and I thought it the more necessary to dwell upon this point, because I perceive that the court of King's Bench, in mentioning the case of *Dormer v. Tburland*, in that of the Earl of *Darlington v. Pulteney*, observed, that, in the preceding case of *Sayle v. Freeland*, Lord King was of opinion, that it was a good execution of a power "*because by will.*" And the court seem to incline to that opinion. But it has been already shewn that this was not the ground upon which Lord King founded his first opinion in that case; and that it is a ground *totally* reprobated and disapproved by Lord *Hardwicke* in the case of *Ross v. Ewer*.

And, upon this principle *alone* is it possible to support many of the decisions, which will next fall under our consideration; namely, those in cases which have been deemed, in chancery, exceptions to this rule respecting the *strict* performance of all *incidental circumstances*; for, we shall find that, in cases where powers *respecting lands* have been directed to be executed by will, the court of Chancery have dispensed with that clause of the statute of frauds that requires the attestation of three witnesses; and have held a will, in execution of a power, *good*,
although

although it hath only been attested by *two* witnesses. Now, as there is no *position* of law, more *clear* and decided, than that the court of Chancery cannot, in any case however favorably circumstanced, support a will *to which* the attestation of *three* witnesses is required by that statute, unless *that form* be complied with ; the only *ground* upon which the court can exercise an *equitable* jurisdiction to *dispense* with *that* circumstance is, by considering a will, under such predicament, *not* to be *strictly* a will, but to be a *distinct* kind of instrument, *in nature of a will*, made in execution of a power.

And this mode of considering such a will is clearly consistent with the rule we have mentioned before ; namely, “ that, where a power is directed to be executed by a will, it shall be presumed that such a will is to have all the requisites necessary to the constitution of a regular will, according to the nature of the property it is to operate upon, and to be liable to all the contingencies to which a strictly legal will would be subject ;” for, that rule was adopted to effectuate the intention of the creator of the power. But, when the court are to look at the instrument, when executed, *qua the execution of a power* ; they are *then* not bound to

Supra 91, 92.
Infra.

to consider the instrument of the donee of the power *strictly* as a will, which it is not ; but, as *an instrument* taking effect *out of the deed* creating the power, and made *in execution* of the power ; and, in this view, not affected by the statute of frauds.

Dey v.
Thwaites,
cited 3 Ch.
Ca. 69.
S. C. 2 Vern.
80, but not
to this head.

Thus, in the case of *Dey v. Thwaites*, where T. made a settlement of lands to the use of himself for life, and afterwards to such child or children, and for such estate, or estates, as he should, by any writing under his hand and seal, testified by *two* credible witnesses, limit and appoint. He, afterwards, made a will which was executed in the presence of *two* witnesses *only*. And the question was, whether this, being void by the statute of frauds as a will, should nevertheless be good as a declaration of trust and an execution of the power ? And it was *decreed* to be a *good* execution of the power ; for, though it was not effectual in all points (as it was intended) *as a will*, yet it was a *writing* which had *all* the circumstances required by the power.

We come now to the consideration of those cases, in which the court of Chancery does not consider itself restrained to an observance of the same rule, in respect to
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the strict performance of all incidental circumstances required to exist in the execution of a power, by which courts of law are bound. I mean those cases in which that court regards the end and consideration of the execution of the power, rather than the strict legal requisites annexed to the execution of it in its creation : or in which that court relieves against the circumstances upon equitable grounds.

Et vide
Burnet v.
Holgrave,
supra, 9th et
2 Vez. 642.

It is necessary for us *here* to recollect, that these kind of powers arising out of uses, were *unknown* to the common law *previous* to the statutes relating thereto, and originally belonged, *in point of jurisdiction*, to courts of equity only ; and that there was, in law, no other mode of reserving an authority over an estate given to another, than by means of a condition ; but, when these statutes, and particularly that of 27 *Hen. 8.*, by transferring uses into possession, incorporated the use and the possession together, they became legal estates, and fell under the jurisdiction of courts of law. Now, as conditions which were to defeat estates vested, were considered in courts of law, as odious, so, when powers fell under their jurisdiction they made a distinction between powers of appointment and powers of revocation :
and,

2 Will. 227,
ibid. 490.

and, as the latter were generally annexed to voluntary settlements, and always tended to overthrow and defeat estates raised by the instrument in which they were contained, and whereby they were actually settled by the owner of the inheritance, they, in analogy to their rules respecting conditions that went to defeat estates, considered these also as odious; and, therefore, required that *every* circumstance, that was appointed to attend the execution of them, should be *precisely* complied with before they could divest an old estate or create a new one. But, as this construction was repugnant to the nature of powers, and, in cases of settlements made for the benefit of children, militated against the rules of equity, which considers children as purchasers; courts of equity seized on this circumstance as a ground to resume their jurisdiction, holding that, in conveyances to uses executed, as well as in common law conveyances, *the consideration* of any *equitable interest* in the estate conveyed, *still* belonged *to the courts of equity* by virtue of the original jurisdiction which they had, before the making of any of the statutes relating to uses, and *which* was *not* taken away by any of them. And, thereupon, they began to interpose and supply such defects whenever there appeared to be a valuable con-

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sideration;

sideration ; as in cases of marriages, jointures, or settlements, or in which there was any other equitable ground for interposition.

But, before we enter upon the detail of the resolutions on this head of our enquiry, it is necessary, in the first place, to observe, that a distinction is taken, *even in equity*, betwixt a *non* execution and a *defective* execution of a power. For, though the court will, under certain circumstances, help the latter, it will *never* aid the *former*, because so to do, would be regugnant to the nature of a power ; which always leaves it to the free will and election of the party to whom the power is given, whether to execute it, or not ; for which reason equity will not compel the execution of a power, or construe the act *as done*, when there is *no evidence of the intention* of the party to do it.

Thus, where a fine was levied of certain premises by *A.* and *B.* his wife, the uses of which were, by deed, declared to be to *A.* and *B.* for their lives, remainder to the right heirs of *A.* ; with a *proviso*, that *A.* and *B.*, or *B.* alone, notwithstanding her coverture, by deed or writing attested by three witnesses not being menial servants, might revoke the uses of the inheritance

Pygott v.
Sir Henry
Penrice, et
ux.
Comyns 250.
Same Law,
Arundel v.
Philpot, sup.
136. et 2
Vern. 69, et
Ch. Ca. 70.

ritance after the life of *A.*, and limit new uses. Afterwards *B.*, being sick, wrote a letter, dated 24th *January*, 1713, to *E.*, who prepared the settlement according to the fine, and desired, “ that he would prepare a deed with speed ; for, that since she had a power of revocation, and was unwilling the first deed should have been made as it was, and had used arguments against it, and was dissatisfied in conscience about it, she wished there might be an alteration, till when, she should not die satisfied ; for they all knew her sister’s *Nelson’s* meaning, and she [*B.*] gave the inheritance of that part to her niece *Gore*, who was the daughter of her eldest sister ; and also saying that she would bequeath several specific sums therein named to charities. And, on the back of the letter, *A.* indorsed, that *E.* should keep it secret. This letter was delivered to *E.* about the end of *January*, *E.* communicated the contents to *A.* the husband, and, in the beginning of *February*, sent a letter to *B.*, by which he desired to know, whether she would have the estate limited to her niece and her heirs ; and whether, if her niece should die without issue, or under age, she would not in that case augment her charities. *February* 26th, *E.* wrote another letter to *B.* to let her know that the deeds
were

were prepared for the charities, and desired to know who were to be the trustees. *March* 10th, *B.* died. *E.*, having been examined in a cause, (instituted by *A.* to recover the property by virtue of the original settlement) deposed, that, when he acquainted *A.* with the contents of the letter he had received from *B.*, *A.* did not, as he knew, propose any method, or use any means to hinder any revocation, or new deed of settlement; and that he received no other orders, or any answer to either of his letters. And the question upon all these facts was, whether this letter of *B.* amounted to a revocation in equity? And it was insisted that it did; for, it shewed *her intention*, that there should be a revocation, which seemed to have been obstructed by *A.*; for *E.* was his attorney, and he was desired by *A.*'s letter to be secret. But *E.* communicated it to *A.*; and, though he deposed that he did not know "that *A.* did propose any method, or use any means to hinder, &c." yet the manner of penning his deposition was suspicious; and when *E.* was desired to prepare a deed for the revocation with speed, he did nothing, nor wrote any answer until *February*, and then desired to know if the estate should be to *B.*'s niece and her heirs; when the letter had mentioned that the inheritance

heritance should be settled on her niece ; and it did not appear whether *E.*'s letter ever came to *B.* , but the delay seemed to be affected, and *A.* must necessarily be supposed the cause of it. But the Master of the Rolls would not allow this to be a revocation ; for, there was no proof that *A.* hindered the execution of the revocation, if his wife had chosen to execute it.

Comyns 2531

This case was afterwards heard before Lord Chancellor *Cowper*, upon an appeal, who affirmed the decree, and his lordship said that, as to the revocation, the letter did not amount to that ; for though, perhaps, *her intention* was to favor her niece, and there was a delay and neglect in the agent *E.* , with a design to favour his friend *A.* ; yet this *endeavour* of hers, without any thing *done* in furtherance of it, and without pursuing the circumstances required by the power, would not amount to a revocation.

But, if the power be executed for a consideration, or, if any equitable ground of relief interferes, a court of equity, as hath been said, will supply the omission of any of the formal circumstances required, by the instrument creating the power, to attend the execution of it.

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The grounds on which courts of equity interpose, in relieving against the omission of circumstances in legal proceedings, may be comprized under three heads, namely, accident, or fraud, or trust on the one side, and a consideration or confidence on the other; for, in contemplation of equity, every person executing an instrument to convey property for a consideration, or undertaking a confidence, is, after having received that consideration, or subjected himself to that confidence under a *moral obligation* to make a perfect and complete transfer of that, for which the consideration was given, or to perform the trust confidentially reposed in him: and the existence of that moral obligation, is the foundation of the jurisdiction of the court of Chancery, which presides over the consciences of men.

Now considerations are of two kinds; namely, civil and moral; the first founded upon an express stipulation, the second founded upon an implied obligation which subsists between the parent and the child. The former is distinguished in our law by the term *valuable* consideration; the latter by the term *good* consideration.

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And

And, in respect of powers, as in all other cases, the highest consideration in contemplation of equity is a valuable one ; therefore an actual purchase for money, or by marriage, is the first object of attention *in equity*, and *every thing* will be done there in the favor of such a purchaser, and *nothing* against such a purchaser.

A creditor is considered in equity, as a purchaser for a valuable consideration.

Pollard v.
Greenville,
1 Ch. Ca.
10.

Thus, where P. lent G. 100*l.*, and C., as G's agent and friend, became bound for the same ; G. having power to make a lease of her estate for 21 years in possession, made a lease to C. for 21 years to secure him from this and several other debts that he was engaged in on G's account. But the lease was made to commence from a time to come, which was void in law in respect of her power. C. had the possession for some time, but was ousted by force by G's husband. But he dying not long afterwards, she enjoyed for the remainder of the term ; and C. being dead and leaving no assets, P. preferred his bill against G. for the debt. But, as it appeared to the court that the money was employed for *her* use, who made the lease in trust for payment of debts, and she having
received

received the profits for thirteen years ; tho' the lease was not good in strictness of law, yet the court, consisting of the Lord Chancellor, Master of the Rolls, Chief Justice *Hide*, and Justice *Twisden* held, that the same did amount, *in equity*, to a good declaration of her power, to make the lease for 21 years in being ; and they held that the receipt of the profits was under that power, and subject to that trust.

And children are, *in equity*, considered as in the *nature* of creditors, claiming a debt *founded* upon the *moral obligation* in the parent to provide for the child, which is, in equity, a *good* consideration upon which a debt may be contracted.

And, in favor of *purchasers* for a valuable or good consideration, a court of equity will dispense with the form of the instrument, if the donee of the power make a conveyance, from which the court may conclude that he intended to execute the power. For, although, where the question, as to the execution of a power, arises between the original donee of the power or his appointee without consideration, (whose claim can be no better than his under whom it arises,) and the owner or remainder man, (entitled

to that which is the subject of the power, in default of execution of it,) the latter, having a vested interest, will *clearly* be entitled against the former, unless the former shew that the interest of the latter is divested by an *actual* execution of the power in *due* form; because, as with respect to that interest, in the subject matter on which the power attaches, which is to be carved out of it by the execution thereof, the owner of the interest under the power, and the owner of the subject out of which it is to arise, are claimants upon an *equal* footing, no valuable consideration existing upon either side: the consequence of which is that possession turns the scale, and gives the best title in law to the owner or remainder man, and there is no *equitable* ground of relief in the appointee to oppose to it; but, as between the appointee for a *valuable* or *good* consideration, and the owner or remainder man, the case is different; for, as the circumstances are considered, as added to the execution of the power *only* to prevent surprise or fraud upon the donee thereof, and as the nature of the transaction, whether it be executed for a valuable or a good consideration, evinces, that neither of those circumstances exist, the act of the donee, in such case, *attaches* immediately upon *the thing*,
which

which is subject to the appointment, in *ré-
spect* of the consideration. Then, as the title
of the owner, or remainderman to the interest
in the thing, so far as the same is subject to
the power, is *merely* as a volunteer, and *with-
out* consideration, and the title of the ap-
pointee is as a purchaser, and *upon* consider-
ation, a moral right arises in favor of the
appointee, upon which civil equity founds
a trust that binds *that* which is the subject
thereof, in whose hands soever it is; and
the court of Chancery, (considering the ap-
pointee as *cestui que* trust of the thing, and
the owner as trustee, and the question arising
as between the *cestui que* trust, in his own right
as a purchaser for a consideration, and the
owner, and not between the donee of the
power, and the owner,) gets a jurisdiction
over the cause. And the court, in that case,
does not consider the form of the convey-
ance, but takes it as it was actually intend-
ed; namely, as a conveyance *made* in the best
manner that it could be *at law*: for, in equi-
ty, the substantial part of every contract,
whether *civil* or *moral*, is the *consideration*;
and for that the right is transferred, and
what ought to be done is looked upon in
equity as done. And therefore the court
relieves against the imperfect execution of
the power.

Upon this principle, a covenant in a marriage settlement has been held a good execution of a power in favor of a wife.

Fothergil v.
Fothergil,
2 Freeman
256. Trin.
1702.

Thus, where *F.*, having estates in *Yorkshire* and *Durham*, settled his estates to the use of his son *T.* for life with remainder over; with a power for *T.* to limit any part of the estate, not exceeding 100 *l. per annum*, for a jointure for any wife he should marry. The lands in *Durham* being 180 *l. per annum*, were charged with 100 *l. per annum* to the widow of *F.* for her life. *T.* married, and thereupon limited the 100 *l. per annum*, out of the *Durham* estate, which, for the reason above-mentioned, was deficient in value, but he covenanted in the deed, that, in case the value should be defective, it should be made up out of his *other* estate. He being dead, and the estate proving so to be, the widow brought her bill to have the deficiency supplied out of the *Yorkshire* estate: and it was held by the Lord Keeper and Master of the Rolls, that this defect in the execution should be supplied, and the plaintiff relieved.

And so, if the power be *actually* executed *only* as to part, but intended by the parties to extend over all that it will
cover;

cover; the court of Chancery will rectify the deficiency, although the covenant be not express to make it up out of the lands subject to the power.

Thus, where Lord *Clifford*, being by marriage settlement tenant for life of certain manors and lands in *Ireland*, of the annual value of 1000 *l. per annum*, or more, with power to make a jointure not exceeding that sum, covenanted, upon his marriage with Lord *Berkley's* daughter, to settle a jointure on her to that amount; and, pursuant thereunto, a settlement was made, *and a particular of lands*, being part of the premises within the power, *mentioned and set out for the jointure*, and there was a covenant in the settlement, that they were of the yearly value of 1000 *l.* Lord *Clifford* died: and the lands settled fell short, and were not worth above 600 *l. per annum*.

Clifford v. Burlington,
2 Vern. 379.
S. C. cited,
2 Will. 229.

And the question was, whether this covenant could be considered as an execution of the power, so that the deficiency might be made good out of the premises subject thereto?

It was contended for the remainder-man in tail, that, he claimed under the marriage-

settlement as a purchaser, and that Lord *Clifford* had only a power to have charged the estate with 1000*l. per annum*. That, if he had neglected to do so, and had died without executing his power, a court of equity could not do it for him, and, thereby, raise a jointure of 1000*l. per annum* in the estate, although it had been reasonable and just for him to have done it in his life-time. The law then would be the same if he had executed his power in part, *that* could not be extended or carried further *in equity*. If tenant in tail covenanted to make a jointure, although he might have done it by a fine or common recovery, yet a court of equity could not relieve or decree a jointure. But, Lord Keeper *Wright* decreed the jointure to be made up 1000*l. per annum* out of the lands subject to the power against the issue in tail, although he was not privy to the marriage-treaty, nor guilty of any fraud.

Alford v. Alford, cited,
2 Will. 231.
5 Dec.
8 Anne.

And this principle was carried still further in the case of *Alford v. Alford*, for, in that case, no mention was made of the premises subject to the power; and the donee of the power, at the time of his covenanting to make the jointure, had not the power vested in him; for it was to commence after the death of certain tenants for life without

out issue male; and the covenant, which was held to execute the power, was made in the life of one of those tenants. But, although it might be considered as a sort of strain in the sense of terms, to say a power was executed before its commencement, yet the execution was allowed to be good in equity. The facts of the case were as follows: *A.* settled land on himself for life, remainder to his wife for life, remainder to his first and other sons in tail male, remainder to *F. A.* for life, remainder to his first and other sons, &c., remainder to *E. A.* in like manner, with power to *F. A.*, *after the death of G. A. and his wife* without issue male, or of any after-taken wife of *G. A.*, to settle so much of the premises as did not exceed 100 *l. per annum* in jointure on a wife. *F. A.*, in the life-time of *G. A.*, covenanted, in consideration of marriage, to settle lands of 100 *l. per annum* upon his then intended wife; and afterwards *G. A.* and his wife died without issue. Then *F. A.*, who gave this covenant for settling a jointure, died without issue, whereby the premises came to the remainder-man *E. A.*: and the widow of *F. A.* having brought her bill against *E. A.* to make good her jointure; it was decreed by Sir *John Trevor*, Master of the Rolls, on considering many precedents (as is expressed

expressed) that the covenant to make this jointure was a good execution of the power, and that the wife was well intitled to the 100 *l. per annum*, and all arrears, from her husband's death.

And so little attention does a court of equity pay to the interest of the owner or remainder-man, when put in competition with that of the appointee of a power so circumstanced; that, if the donee of such a power execute it in equity, by marriage-articles refering thereto, and therein reserve to himself an election to secure a jointure, either under his power, or otherwise, at his discretion, any act of his, by which he shews a disposition to make the settlement on the lands subject to the power, will, in equity, amount to an election to bind the owner, or remainder-man; and the latter cannot, in respect of such election, discharge himself from being liable to the execution of the power, and put the appointee, in the first place, to pursue the personal effects of the donee under the covenant or articles.

Countess of
Coventry v.
Earl Coventry,

Thus, where *Thomas Earl of Coventry*, being seised in fee of several manors, &c. 2 Will. 222. S. C. Gilb. Rep. Eq. 160. Strange 596. Et vid. arguments at large at the end of Francis's Max. in Eq.

some

some in possession, and others in reversion expectant upon lives, by will, dated *March* 24, 1658, devised part thereof to his eldest son *Thomas* for his life, remainder to his first and other sons in tail male, remainder over, &c. ; in which will there was a power given to any of the devisees for life (when seised) by any writing or writings, indented, under his or their hand and seal, or hands and seals, to settle any part of the premises, not exceeding 500*l. per annum*, upon any wife which they should respectively marry, for her jointure, so as such wife brought a portion equivalent to such jointure. The testator died, and the eldest son died, leaving a son, who dying under age, the second son, *Gilbert*, succeeded to the estate. *Gilbert*, being seised of the estate by virtue of the will, upon a treaty of marriage with the plaintiff (his second wife) and Sir *Strensham Masters* her father, by articles, in consideration of the intended marriage, and 10,000*l.* which was actually paid as the marriage-portion, covenanted *that he or his heirs would, after the marriage, at his own costs and charges, according to the power given him by his father's will, or OTHERWISE, by good conveyances, convey, settle, limit, and appoint, or cause to be conveyed, settled, limited, or appointed, manors, messuages, &c. of 500*l.**
per

per annum upon the plaintiff for her jointure, to commence in possession immediately after his death if she survived.

Soon after the marriage, Earl *Gilbert* went down to his country seat, delivered the articles to his steward and his court-keeper, and directed them to look over his rentals, and to find out a fit part of the estate to settle according to his rentals. A part being at length fixed upon, and a particular thereof being made, the earl ordered instructions to be drawn for counsel. These were afterwards sent to counsel, and, upon their opinion being given, a settlement was drawn and ingrossed, and left with the earl's steward for execution. From various circumstances the execution of the deeds was omitted, and the earl fell sick and died. And, on a bill brought against the remainder-man in tail under the original will, and the personal representatives of Earl *Gilbert*, two questions arose; First, Whether any acts done by Earl *Gilbert* would be binding, and a real lien upon the remainder-man. Secondly, if so, whether he had any right to be relieved against the heir and executor of Earl *Gilbert*, touching his real and personal estate.

And,

And, upon the first question, Lord *Macclesfield*, the Master of the Rolls, Mr. Baron *Price*, and Baron *Gilbert*, were clearly of opinion, upon the principles already mentioned, that the *articles*, refering to the will, would have been alone sufficient to have bound the estate subject to the power, and that they operated as a real charge and lien upon the remainder.

Upon the second question also they agreed, that the remainder-man had no right to be relieved against the heir and executor of Earl *Gilbert*; but they differed in opinion as to the operation of the words of the settlement; for, upon that question, Mr. Baron *Gilbert* observed, that the covenant was, that the earl, or his heirs, or executors should settle lands in pursuance of the *power, or otherwise*. It had been said at the bar, that the words, *or otherwise*, at the end of the covenant, should be looked upon as mere technical words in the draught, and that they should have no operation to charge the real or personal estate of the earl. *That*, in his opinion, was cramping the articles too much: for, to reject any words out of wills or conveyances, it must appear exceeding plain, that nothing could be meant or intended by them. This had been a *sacred*

~~ered~~ rule in all expositions, and what, if once departed from, might introduce the greatest inconveniences, and by degrees cancel and defeat the end of all written agreement whatsoever. His apprehension was, that the words, "*or otherwise,*" were auxiliary to the real lien upon the estate by the former words. That he took to be the natural and general construction; as he looked upon it, that the marriage was had, and the portion paid, in contemplation of the power; and if the earl had not had such a power, the marriage had never taken effect; and therefore the dominion he had over the estate by virtue of the power, must be reckoned to be the consideration of the marriage, and the original foundation of this jointure; but the words, "*or otherwise,*" made the obligation he was under for providing for the lady still stronger than it was before. The power was a lien only upon the heir, and he alone in execution of the power, could have been obliged to make good the jointure: but, as the estate was loaded with many incumbrances, which must have been previously satisfied and discharged before such jointure could take effect, it was but a prudent provision, to bring the assets, which were come to the hands of the executor, in aid of the provision he intended for

for his lady; and to make the executor auxiliary, in case the land proved defective. The only ground of the exposition contended for, was, that, whensoever there was a debt charging a real estate, the executor should assist the heir in paying it, because the assets were the proper and natural fund for satisfying such a debt; since, if the testator himself had, in his life-time, discharged it, the assets would have been so much the less considerable; and that, as mortgages which were due to the deceased, went in increase of the personal estate, so it seemed to be just, that the same fund should be applied towards satisfying them: and, therefore it was, that courts of equity did every day settle proportions and contributions in these cases between heirs and executors. But, it could not here be presumed that the parties had it in their intention to subject any thing but the power; and, therefore, to bring in the personal estate, would be creating an original power, that was nowhere taken notice of, nor did it appear to have been intended in the whole negotiation. This he said would be substituting a new power instead of an old one.

Baron *Price* thought the words, *or otherwise,* were not to be laid any great stress on, or
were

were of great weight, being *generally* inserted in all covenants by conveyancers. But, granting them the strongest import and signification, he thought they had this obvious and natural meaning; that Earl *Gilbert* might be at liberty to make a provision for his lady out of another fund; or that, if the estate to which the power extended should prove short and defective, he should be obliged to assign another fund for supplying such deficiency.

The Master of the Rolls agreed with Baron *Price* in thinking, that Earl *Gilbert* had his election to make this conveyance, by way of appointment according to the power, or, to convey or procure to be conveyed an estate in fee simple; and this was his opinion notwithstanding the objection that had been made, that the word *heirs* ought to be rejected, as inconsistent with the provision, which was to take effect *immediately* after the death of Earl *Gilbert*, which it was impossible it should do (said they who made the objection) in case such provision was to be made *after* his death by his heir. Yet *here* were words, whereby he had a liberty to execute those articles, by appointing the use pursuant to the power, or, by conveying lands in fee simple; (though

(though he did not think the earl would deliberate long upon that point, whether he should charge lands which were already settled upon the remainder man, or those which he had absolutely in his power) but that which shewed he was to have an election were the words, *or procure to be conveyed*, which must necessarily have relation to lands in fee simple only, because the power of appointment under the will, being personal to the earl himself, he could not transfer it to, or procure it to be executed by, another. Taking this exposition then to be right, there was no reason that, because Earl *Gilbert* thought fit to contract for lands which were in his power, and also for lands which were not in his power, the party with whom the contract was made should thereby be prejudiced as to the lands which were in Earl *Gilbert's* power: and the question coming to be whether, within the view and intention of the parties, these articles ought to be considered as a charge upon the lands, which he might charge in the power in the will? he must be of opinion, that they were a charge upon that estate, and that the alternative was but auxiliary, and put in as a position, in case of a default in the lands comprised in the power: and, therefore, that the present lord could not deliver him-

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self from the execution of that power which it was certainly within the intention of Earl *Gilbert* to have executed, and which was as clearly within the intention of Sir *Strensham Masters* to stipulate for.

And as to this point the Lord Chancellor agreed with the Master of the Rolls in opinion, saying, that it would be a most extraordinary exposition of the articles, and what must tend intirely to defeat the intention of the lady and her friends, that because his lordship had a liberty to settle other lands, (if any he then had or should purchase afterwards) therefore she should lose her lien upon the estate which was first bound and contracted for, when he had made no other settlement; that the principal covenant should be triped up and defeated by that which was only auxiliary.

It is observable upon the foregoing cases, that they fall nearly within the principle laid down in the fourth resolution in *Clerc's* case; for, in all these cases, the donee was clearly invested with the power, and able to have executed it properly, and indisputably intended to execute it in favor of the appointee: and the instrument which the court construed, as effecting that intent,

was of the same species as that required by the power : namely, a deed. Then the court went no farther than it ordinarily does ; it held that the consideration being paid for the covenant, gave the covenant the effect of an actual conveyance ; so that the court only put a construction on the intent of the covenantor, and not on the power, or the instrument of execution, as with relation to the power ; for that instrument answered in form the description of the power.

But, in the two following cases, we shall see the court went still farther in favor of a wife ; for, they not only held that a power was well executed by one species of instrument, when it was *expressly* required to have been executed by another species of instrument ; but also that where the party appointing by virtue of the power was, at the time of executing the instrument decided to be a good execution of the power, unable to do any legal act by reason of infancy.

Thus, where the husband, by virtue of a settlement made upon him by an ancestor, was tenant for life, with remainder to his first, &c. son in tail male, with a power to the husband to make a jointure to his wife, " by deed," under his hand and seal. The

Tollet v.
Tollet.
2 Will. 485.
Mich. 1728.

husband, having a wife for whom he had made no provision and *being in the Isle of Man*, by his last will, under his hand and seal, devised part of his lands within his power to his wife for her life. It was objected, that this conveyance, being *by a will*, was not warranted by the power, which directed that it should be *by deed*; and a will was a voluntary conveyance, and, therefore, not to be aided in a court of equity. *Sed per curiam* this was a provision for a wife *who had none before*, and within the same reason as a provision for a child not before provided for.

And, in the preceding case, the legal estate being in trustees, they were decreed to convey an estate for life to the widow, in the lands devised by her husband's will.

Hollingshead
v. Hollingshead.
cited 2 Will.
229. 4 June
1 Annæ.

Again, where *M.* devised lands to the use of himself in tail with remainders over; with a power to the several tenants for life, *when* in possession, to make a jointure, so as such jointure did not exceed a moiety of the estate; during the infancy of one of the tenants in tail, there was a treaty for his marriage; which being agreed upon, his mother and he (the infant) covenanted with the wife's relations, that within six months
after

after he came of age, he should settle *so much of the land* as should amount to 100 *l. per annum* upon his then intended wife for her life. The marriage took effect, and they had issue a daughter; and the husband dying afterwards without making the jointure, the widow brought her bill against the remainder man to compel him to make good the same; and it was objected. First, that this covenant was made by an infant who could not covenant. Secondly, that no land *in particular* was covenanted to be settled, but only so much as should amount to 100 *l. per annum*. But it was decreed by the Lord Keeper, that this covenant was, in equity, a good execution of the power.

And such a covenant, relating to lands subject to a power, made in consideration of marriage, will operate, in equity, as a good revocation of a will *previously* made in execution of the power, although in favor of a child.

Thus, where copyhold tenements were surrendered by husband and wife, to the use of the wife for life, and afterwards to such uses as she, by any writing, or by her last will attested by three witnesses, should appoint. She accordingly, by a writing purporting to be her last will,

Cotter v.
Layr.
2 Will.
(623.)

- will, and signed by her in the presence of three witnesses, gave, devised, limited, and appointed the premises to her daughter in tail, remainder to her brother in fee. Afterwards she, her husband being dead, did, upon a marriage agreed to be had between her and the plaintiff in the suit, by deed or writing attested *only* by *two* witnesses, *covenant* to surrender the premises to the use of her intended husband and herself, and the heirs of her husband; who covenanted to settle an annuity of 30 *l. per ann.* on his intended wife for her life. The marriage took effect, and she died within the year. And, upon a bill filed by the husband, to compel the daughter to perform the covenant of her mother; it was objected, first, that the deed or writing of the wife's attested by three witnesses, was a good settlement on the daughter, and an effectual execution of the power, which could not afterwards be altered; for, that it would not operate as a will, but by way of writing declaring the use of the copyhold, because a feme covert could not make a will. Secondly, it was objected, that, supposing this to be a writing in nature of a will, yet the agreement made by the wife on the second marriage, being but a covenant, could not amount to a revocation of a will. *Sed per curiam*, though a covenant or articles do not,
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at law, revoke a will, yet, if entered into for a valuable consideration, amounting in that court to a conveyance, they must consequently be an equitable revocation of a will, or of any writing in nature thereof. And it was plain, in the present case, that the writing was intended as *a will*, and not to divest *L.* of her estate *during her life*, as it must have done had it been *an appointment* of an use to take effect in *present*.

And as a covenant is a good execution of an appointment by virtue of a power in favor of a wife whose claim is founded upon a valuable consideration; so it will likewise be, if made in favor of children who claim upon a good consideration: thus where *B.* settled lands to the use of himself for life, and *then* as to part to his wife for her life, for her jointure, remainder to the issue male of his own body with several remainders over; with a *proviso*, that, if he should have any younger children, it should be lawful for him, by deed or will, executed in the presence of two or more witnesses, to limit and appoint any of the said lands, except those in jointure, to such person, and for such estates as he should think fit, for raising 500 *l.* a piece for such younger children, to be paid at such times and in

Sarth v.
Bianfrey.
Gilb. Rep.
Eq. 166.

such manner, as he, by such deed or will, should declare; and, *covenanted to do* so accordingly. *B.* died, leaving several younger children, but did not make any appointment. And, on the question, whether this covenant, *contained in the deed* that raised the power, was a good execution of the appointment in pursuance of the power? Lord *Sommers* held that it was, and deemed it a charge upon the land which bound the issue in tail: and his lordship ordered the 500 *l.* a-piece to be raised for the younger children immediately.

But it seems necessary that such *covenant* should be united with the deed raising the power, or have *reference* to, or *recite* the power, or mention the *hereditaments* subject thereto; for, otherwise, it would fail; as, in such case, a general covenant cannot be considered as an execution of the power, or take effect as a lien attaching upon the estate subject thereto: and something like this seems to have been meant in the passage in the report of *Elliott v. Hele*, 1 *Vern.* 406, where the chancellor says, in his judgment on that case, “ that the power, being a general power to make a jointure, *and not said of what lands in particular*, was not such a lien upon the lands as should affect a purchaser, though

Vid. inf.

though the power had been *afterwards executed*: much less when it was not executed at all; for, as a man by such general power might make a jointure of 500*l. per annum*, so he might make a jointure of 50*l.* or 5*l. per annum*; and that there was a difference between a defective execution of a power, and a power not executed at all."

It appears by the report of that case, as stated, that the instrument that created the power gave the donee thereof divers manors, with a power to settle a jointure on certain premises therein particularly specified, which, *de facto*, consisted only of a mansion-house and lands of the value of about 50*l. per annum*, the other premises contained in the will being previously subjected to an intail; the objection therefore, as put in the mouth of the chancellor, could not apply to this case; because the power here was not a general power, but a particular one, and, consequently, a lien upon the lands if duly executed. Besides, suppose the power had been a general power, it would then have rested on the discretion of the donee thereof, to appoint the whole or any part of the premises subjected thereto in jointure; for, in such case, although the power may be said to be general as to all the

2 Ch. Ca.
29. 87.
S. C. *supra*.

the lands contained in the settlement which raises it, yet, it is particular as to the premises upon which it is to operate; and, not being restrained, of course includes the whole of them: and therefore the appointee under the power has nothing to do but to shew that it has been legally executed as to the whole, or a part, and then her title will be paramount to any purchase with notice made from the donee, be it for a valuable consideration or otherwise, if not carried into effect by an assurance that destroys the power; for, it will be a title, not by the donee of the power, but by the creator of it, and will take effect out of the instrument creating it. But it seems perfectly consonant to equity, that a covenant to make a jointure without specifying of what amount, being inserted in, or referring to any deed, or mentioning any premises, from which an inference or presumption may be made of the extent of the jointure, or of the object on which the jointure is to attach, cannot be considered even as a defective execution of a power; for, there is, in such case, no ground from which a conclusion can be drawn, that the person, making such general covenant, had the power in his contemplation, unless it be, that this should be an execution, because the person who covenanted

venanted

venanted might, by proper means, have executed this power, which would be carrying the doctrine of presumption further than any case that I have met with has yet done, and which, in the case of *Elliott v. Hele*, the court refused to do. The chancellor's observations therefore in *Elliott v. Hele*, seem to me to have been mistaken by the reporter by being applied to the power, instead of the covenant.

As a court of equity will dispense with the form of the instrument by which an appointment, in pursuance of a power, is made; so, likewise, it will *supply* any deficiency in the circumstances required to attend the execution of such power, when it is executed for a *valuable consideration*.

Thus, in the before-mentioned case of *Cotter v. Laver*, although it was objected, that there were but two witnesses to the last deed of appointment, whereas *three* were required by the power, and that, *therefore*, the deed was *void* as not pursuant to the power: yet the court said, that the articles, being for a *valuable* consideration; namely, that of marriage, were good though not in *strictness* pursuant to the power; for the courts,

Supra 181.

courts, in such case, would supply the want of circumstances.

Sargison v.
Sealy,
2 Atk. 412.
S. C. *supra*.

So, where *M.*, having a power of disposing of 4000 *l.* by deed or will, executed in the presence of *three* witnesses, to any person she should appoint: she, being about to marry, by articles executed in the presence of *two* witnesses *only*, appointed 2000 *l.* part of the 4000 *l.* to be for the use and benefit of her intended husband *during the coverture*; and, after her death, to her son. The marriage took effect, and upon a dispute between the remainder-man and the husband, the question was, whether these articles, entered into upon the marriage, amounted to an appointment within the power? Lord *Hardwick* was of opinion that they did; for that, notwithstanding it was insisted that it was a defective appointment, because there were only two witnesses; yet this court could supply that defect, when it was executed for a valuable consideration: *much more* when it was an execution of a trust only, as was the case here: and, although the appointment was inaccurately expressed, and in an informal manner, it would amount to a *grant* of the 2000 *l.* to the husband.

Vid. as to
children,
Smith v. Ash-
ton, *infra*, et
Thwaites v.
Dey, *supra*,
et Prince's
case, *infra*.

And

And equity will supply a defect by reason of a variance from the circumstances required by a power, as well when the power is executed for a *good*, as when it is executed for a *valuable* consideration.

Thus, where J. S., having four children, viz. two sons and two daughters, settled *his estate* on trustees, to the use of himself for life, remainder to his wife for life, and, after their decease, to the use and uses of such child or children, and in such *shares* and *proportions*, as he should appoint by any writing to be by him signed in the presence of *two* witnesses, and, in default of such appointment, to his eldest son in tail. He, by his will signed by him, and attested by several witnesses, devised a *rent-charge* out of those lands to his youngest son for life, and to the first sons of his body successively in tail; and, further willed that, in case his said son died without issue male so as the estate should come to his eldest son, then that he should pay 500*l.* a-piece to his daughters. The son died without issue. The bill was filed by the daughters against the eldest son, to have their five hundred pounds a-piece according to the will. He, by way of plea, set forth the deed of settlement and power *prout*; and insisted that the power was not well pursued nor executed

Thwaites v.
Dey, 2 Vern.
80. et vid.
1 Atk. 568,
569. et
Parker v.
Parker, cited
Strange 604.
et infra.

cuted by the will ; because, although the testator might have distributed the *land* among his children, in what proportions he thought fit, yet, he had not power to grant or devise a *rent-charge*, or *sums of money*, as he had taken upon him to do. But the court disallowed the plea, and ordered him to answer over.

Roberts v.
Dixall, 2 E.
Ca. Abr.
668. 19.

So, where *A.* upon his marriage, covenanted, that his estate should be chargeable with 1000 *l.* for the benefit of younger children: and his wife, having an estate of her own, she and her husband, after marriage, levied a fine of it, and the uses declared were, that *A.* and his wife should have a power by any deed or writing under their hands and seals, or the survivor of them, by his or her last will, *to appoint and divide the estate* among their younger children in such proportions as they or the survivor should think proper. *A.* survived, and by his will gave his daughter (who was the only younger child) 3000 *l.* which he declared should be in lieu and in full satisfaction of the 1000 *l.*, covenanted to be raised out of his own estate, and he charged the 3000 *l.* on his wife's estate, intending thereby to execute his power. And one point made was, whether this was a good execution of the power?

power? And it was urged, that this was a naked power, and ought to be executed in the *very* terms of it; and it was compared to a condition, which must be strictly performed; but resolved *per* Lord *Hardwicke*, that the power was *in substance* well executed. It was true the direct terms of the power were not pursued, but the *intent* and *design* of it was: it was admitted that the father might have appointed *part* of the *estate* to be sold, and the money *raised* by such sale. And what was done was exactly the same thing. The court might order a sale. It was the same to the heir or remainder-man *which way* the child was to be provided for; only, that giving a portion of the *estate itself* might be the means to tear it to pieces, whereas now the estate would be kept intire; and, it was better for the daughter that she should have a sum of money than a small estate; and, though the will might not enure as a good execution of the power in strictness, yet, within the meaning and design of it, it was a good charge for the young lady's benefit.

And, in favor of children, a court of equity will not only aid an appointment under a power *defectively executed*, but also a power defective in itself: as a lease made under

Prince v.
Green, in-
fra.

der a covenant, to stand seised in consideration of natural affection.

And, if a power be first executed *defectively* as to part only of the interest which the appointer has, by virtue thereof, a dominion over, and then he executes it *defectively* as to the whole, a court of equity will, in favor of a purchaser for a *valuable* consideration, reject the first appointment, and supply any defect in the last, the *intention* being evident.

Hervey v.
Hervey,
1 Atk. 561.

Thus, where *Edward Hervey* the father, by a settlement made on his marriage with his first wife, (the mother of the defendant *Michael Hervey* the son,) was tenant for life of the family estate, which was very large, with a power to make a jointure on a second wife of 600*l. per annum*, remainder in tail to his first and other sons. It was agreed, on the marriage of *Michael*, that a recovery should be suffered to bar the uses of the former settlement, and that, in consideration of 5000*l.*, part of the portion paid to the father, *Michael* should be immediately put into possession of part of the estate; and as to the rest, it was to be settled on the father for life, with power for him to make a jointure of such of the lands as he thought proper,

proper, not exceeding 600*l. per annum*, remainder to the son in tail, remainder over; which settlement was made accordingly.

Edward the father, before his marriage with the plaintiff who was his second wife; by a deed, dated the fifth of *May*, 1725, conveyed all the premises in the settlement contained, limited to him for life, of the yearly value of 900*l.*, to trustees, in trust, in the first place, to pay 200*l.* clear, as pin-money, to the intended wife during coverture, and, upon further trust, if she survived her husband, to pay 300*l. per annum* rent-charge to his wife for her jointure, and to permit the defendant *Michael* to take the profits of the estate, provided he did not interrupt her in the receipt of the 300*l. per annum*, which was declared to be in bar of dower of the wife, or of any jointure on any other land. The marriage took effect. Then *Edward*, by a second deed, gave his wife another 300*l. per annum* clear, as a further provision by way of jointure: And afterwards he, by a deed of the 15th *Jan.* 1751, as a further provision for the wife and in execution of the power, conveyed all the same premises to the trustees in the former deed, to raise, during the joint lives of the husband and wife, the further sum of 100*l.*

O *per*

per annum for pin-money, and the nett sum of 600 l. *per annum* as a provision for her in case she survived her husband, in bar of all other provisions before made; and in this settlement was the following declaratory clause, *viz.* it was thereby declared and agreed, by and between all the parties to these presents, that it was the intention of that deed, and of the preceding ones, to secure a jointure to his then wife, *not exceeding* 600 l. *per annum*. *No recovery was ever suffered in pursuance of the agreement on the son's marriage.* Edward Hervey died, his wife surviving; and she filed a bill against Michael, and the trustees under the several deeds, to have the benefit of those provisions, all, or some of them. This cause was twice heard before Lord Hardwicke. On the first hearing his lordship said, the first thing to be considered was the construction of the power under the deed between Edward and Michael Hervey. It was very plain, that this was a power in Edward Hervey to settle a jointure upon any after wife, *toties quoties*, upon any subsequent marriage; it was likewise a power to settle and assure, that was, to convey a legal estate: but then it was limited in point of value, for he could only settle so much as would amount to 600 l. a-year, and that only

only during the natural life of such wife. It was very certain that *Edward* could not, in point of law, by virtue of this power, settle an annuity clear of taxes upon any after marriage by way of provision for the wife. To consider then in what manner *Edward* had executed this power. By the first deed, he had conveyed *all* the lands which were subject to the power to trustees, *not* to the intended wife, for raising a *clear 300 l. per annum*. By the second deed, they were to raise *300 l. per annum more* clear of taxes, &c. and by the third deed he had recited, that he *intended only* to secure to her *600 l. per annum*, and *no more* by *all* those deeds. Then, upon this state, it appeared to his lordship, that the execution of the power was absolutely *void in law and equity*. For the power was to settle lands for a jointure or provision, not *exceeding 600 l. per annum*, and he had settled *900 l. per annum*. The words *jointure* or *provision* were synonymous terms; but this was a *conveyance* to *trustees*, which *was*, in point of law, *no jointure*; for, to have made it so, it ought to have been made to *the wife herself*. *Edward likewise* had conveyed a *clear* estate of *600 l. per annum*, which was also contrary to the power. *Then*, as the execution of the power was *undeniably void in law*, his lordship con-

sidered how it would stand *in equity*, and he said it would be void there too ; but, when he said void there, *he did not not mean that that court would not go as far as possible, to supply a defect in the execution of such a power.*

In the case *then* under consideration, *neither* of the parties could possibly have what was originally intended them by the power ; because, in respect of *Michael* the defendant, it was contrary to what was stipulated between him and his father ; for, here, it was a *clear rent charge* issuing out of his estate, instead of being *subject* to taxes, &c. ; and, in respect to the plaintiff, the widow, there was not what was stipulated for her, because *the power* would not *extend* to give a clear rent charge.

It had been rightly observed by the bar, that a court of equity would supply a defective execution of powers, as well in the case of younger children, and a provision for a wife, as in favor of purchasers or creditors. But, the counsel for the defendant *Michael* had insisted, that this relief was applicable only to a wife *unprovided for*, and that here the wife was provided for by the settlement previous to the marriage. But, as the whole which had been done in this case was *directly*

rectly contrary to the power, she must be looked upon as a wife *unprovided for*.

The cases of *Smith and Ashton*, 1 *Ch. Ca.* 263, and *Tollet v. Tollet*, 2 *Will.* 489. sufficiently proved, that, where powers were defectively executed, this court would supply them notwithstanding. Upon these authorities, and many more which might have been mentioned, there could be no doubt but that, if a tenant for life, who had such power, did, *after marriage*, execute it, though *defectively*, yet it should be supplied. His lordship was of opinion in this case, that the wife could not have what was stipulated for her, previous to her marriage, carried into execution; for, if he should so decree, it would be breaking in upon the agreement under the deed between *Edward* and *Michael*. Then, taking it upon this footing, she must be *considered* as a wife *unprovided for*; and, if so, she was *clearly* intitled to the relief of the court. This case in some respects differed from any other that had been cited, *viz.* *Bath* and *Montague*, &c. because in them there was a *provision*, but a defective one.

Infra.
supra 179.

Thus, it fell pretty much within the rules of a wife or child unprovided for by defect-

Weeks v.
Urn.

ive provisions under wills, and, to this purpose, the case of *Weeks v. Urn*, decreed by Lord Cowper, 1717 was applicable.

One reason that weighed with his lordship, in the decree he was about to make, was, that, if the wife had claimed the 600 *l. per annum* without setting forth any consideration, but merely as a voluntary gift from her husband, there was no doubt but that the court would have given it her; and it would be very absurd to say that, because she set forth in her bill a valuable consideration for part, therefore she should lose the whole. If there had been any proof, in this cause, of her using unwarrantable means to insinuate herself into the favor of an old man, and that she, by imposing upon his weakness, had gained any thing clandestinely, it might have had some weight; but, in the present case, there was not so much as a suggestion of that kind: and *besides* she brought a considerable fortune in marriage. The main argument in Lord Coventry's case, was, that there was a non execution of the power; but, there had always been a distinction between a non-execution, and a defective execution of a power. Here the declaratory clause in the last deed had supplied any defects that might be in the former,

er, and the natural consequence of this was, that the parties waived all benefit that might accrue to them from the other settlements, and were contented with the provision that was made pursuant to the power. That clause which empowered the son to hold the estate, provided he paid 600 *l. per annum* rent to the trustees for the wife, was not within the power, and was, consequently, void : and no conveyance could be pursuant to the power, but what was to the wife herself only. And his lordship decreed, that *M.* and the trustees should convey to the plaintiff a jointure, not exceeding 600 *l. per annum*, out of the premises subject to the power, liable to taxes, repairs, &c.

This cause was afterwards re-heard, and, on the re-hearing, it was contended on behalf of the defendant *Michael*, that the father, by the power, was to have a liberty of making such a jointure or provision as did not exceed the rents and profits of an estate of 600 *l. per annum*, and though, as an express estate had not been limited to the wife herself for life, it was not properly a jointure ; yet, in that court, by way of provision, it might be construed a due performance of the power. For, first, it was a good execution of the power at law. Secondly, if not good at

Quere when
Supra. 189

law, it was certainly so in equity. Under the deed of 1725, it was agreed between the plaintiff and her husband, that, after the rent charge of 300 l. a year out of an estate of 600 l. a year, the residue of the rents and profits should go to his son *Michael*. Therefore, as these were parties able to contract in a court of equity, this must be considered as good by way of agreement, and any further sum, which the wife had by way of addition after the marriage, must be considered *merely* as a bounty, and the case of *Newport and Savage*, before Lord Chancellor *Talbot*, and *Tbwaites v. Dye* were cited to shew, that, when a person had a power of charging lands to such of his children, and, in such shares and proportions, as he, by any writing should appoint, he might not only limit, but charge the lands, with any rent charge or sum of money.

But Lord *Hardwicke* said that, after hearing it argued fully, he still retained his former opinion. He would not repeat what he had said before, but would apply himself to give an answer, to what seemed to him to be the principal reason urged for a re-hearing. The general argument was, the validity of the first settlement, *at least* in a court of equity; but he took it to be clear that the deed

deed of 1731, which was the ultimate attempt towards the execution of the power, was a waiver of the former settlements, and *supplied* any *defect* that might be in the other two.

He was of opinion that, if this power had been executed by the deed of 1725 *in favor of a stranger*, instead of in favor of a wife, it would have been good: but, being merely an equitable thing, the person claiming must come into a court of equity. With regard to the deed of *May*, 1725, it had been said, that the power, having been completely executed, it could not be executed *toties quoties*. But he was of opinion it was not executed either in law or equity.

Supposing it had been defectively executed, and the parties had afterwards executed it properly, there was no doubt but that the law would have looked upon the first as null and void, and it might therefore have been executed over again.

As this was a power to make a jointure of lands *only*, not exceeding 600 *l. per ann.*, it was not the intent, that the whole estate should be incumbered; for, the remainder man was to have the *surplus*, which he
would

would not have, if the 300 *l. per ann.* rent charge should take place; for, then, the whole would be liable to answer the rent charge, and by that means the remainder man would lose his surplus. But, *then*, it had been said, that the court might have taken 600 *l. per ann.* out of the 900 *l. per ann.* to answer this rent charge. But suppose this estate had lain in level or marsh grounds, there might have been inundations, and then the part so allotted might not even have produced a rent charge of 300 *l.* This would have been a prejudice too, in respect of a subsequent remainder man; for, supposing the 600 *l.* a year had, by any accident, proved an insufficient fund, then the arrears of the rent charge would have run on, and the remainder man, *at least*, who stood behind *Michael*, would have been injured.

His lordship agreed that, if there had been no settlement besides the deed of 1725, the court would have found out some other way to make the provision for the wife effectual, and might perhaps have done what Mr. *Noel* had pointed out; allotted so much of the estate, which was subject to the power, as would have been sufficient to have answered a clear nett sum of 300 *l.* annually, making
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an allowance for landed estates being liable to taxes.

But his lordship was of opinion, that, whatever the court might have done, under the deed of 1725, to aid and assist the wife, if it had stood singly and clear of subsequent settlements, yet, as the case was now circumstanced, if the court could not give her what was *agreed and stipulated for* under this deed, they would certainly secure to her what was given under the settlement of 1731. And, as this was a rent charge, and not such a provision as was stipulated for the wife, she must be considered as absolutely unprovided for, and then she would clearly be entitled, according to the rules of equity, to be aided and assisted in carrying a defective provision into execution.

It had been said, that, where there had been an excess in the execution of a power, there were no instances in which this court had assisted to carry such a case into execution; but, though there were an excess or a redundancy in the thing itself, yet it must be considered *only* as a defect in the legality; and there were many cases to this purpose. His lordship would put one, suppose a power to lease for twenty-one years, and the person
leased

leased for forty, this was void only for the surplus, and good within the limits of the power. And upon the whole, his lordship directed his former decree should stand without variation.

1 Atk. 567.

But it was said, by Lord *Hardwicke*, in the preceding case, that if there had been words in the first settlement, which had shewn that the power was fully executed, or which would have amounted to a release of it, that would have prevented any *subsequent* execution; but, the ordinary words usually put in by conveyancers, *viz.* "in bar of dower and thirds," would not have that effect.

Where the aid of Chancery is required, in favor of a purchaser, to give effect to a power defectively executed, the decree will be the same, whether the applicant be a purchaser for both a valuable and good consideration, or, one who claims in respect of a good consideration only; nor will it be material whether such settlement under a power be made before marriage, or after it.

Vid. 1 Atk.
564 and 567.

And of this opinion was Lord *Hardwicke*, in the preceding case; for it was there contended

tended by the counsel for *Michael Hervey*, the remainder man, that, as the portion which the plaintiff had brought in marriage was only 2000 *l.*, the settlement of 300 *l.* *per annum* was much more than adequate to that fortune; and, as that settlement was good in law, or, if not, then, in equity, the second deed, executed *after the marriage* of *Edward Hervey* with the plaintiff, ought to be considered as merely voluntary. But Lord *Hardwicke*, as to this point, was clearly of opinion, that, in cases of aiding the execution of a power, either for a wife or child, whether the provision had been for a valuable consideration had never entered into the view of the court; but, *being intended for a provision*, whether *voluntary* or *not*, had been always held to intitle that court to give aid to a wife or child to carry it into execution, though *defectively* made.

Fothergill v.
Fothergill.
2 Freem.
256.
Supra. 165.

Neither is it material, in the case of a wife or child, that the person who comes for the aid of the court is already *provided for*; unless the *provision* already made be *extravagant*; for, in such case, it is an invariable rule, that *the husband* or *the father* are the *proper judges* what is the *reasonable* provision for a wife or child.

Per Lord
Hardw. in
Hervey v.
Hervey.
1 Atk. 568.

And

Kettle v.
Townsend.
1 Salk. 187.

And this principle was agreed to in the House of Lords in the case of *Kettle v. Townsend*.

Lady Ox-
ford's case.
Cited in
Smith v.
Ashton.
1 Ch. Ca.
264. et
Smith v.
Ashton. ibid.
S. C. infra.
Per Lord
Hardw. in
Hervey v.
Hervey.
1 Atk. 568.

So, the jointure of the Countess of *Oxford* was decreed good, where the power was not pursued; yet, *only* part of her jointure *depended* on the *question*.

And, when a father, or husband, has done any thing *extravagant*, the court does not, in either of these cases, *break through* this *general* rule when they set it aside; but they go upon a collateral reason, namely, that this *extravagant* provision either for *a wife*, or *one child only*, is a prejudice and injury to the rest of the family; and that one branch ought not to be improperly preferred to the *ruin* of the rest.

But, the court will not aid a power executed defectively, in favor of a plaintiff being a purchaser for a *valuable* or *good* consideration, where the defendant's title is on an equal claim, springing out of the same root; although the *person claiming* by the *later* instrument have *notice* of the power.

Elliott v.
Hels.
1 Vern. 406.
2 Ch. Ca.
29, 87.

Thus, where tenant for life of lands in the counties of *D. S.* and *C.*, remainder over in tail, with a power for tenant for life to limit
and

and appoint C. to any wife after the death of E. who then had a jointure on the same premises. E. died and then tenant for life married, and received 3000*l.* portion with his wife, and, by articles, before his marriage, covenanted to settle 300*l.* *per annum* of lands in the counties of D. S. and C. ; but no *particular lands* were expressed. Tenant for life died, before any settlement was made. It afterwards turned out that part of the lands, *expressly* subjected to the jointure, were previously intailed ; and, that the premises untailed were not of greater value than 50*l.* a year, or something more. Afterwards the wife died, and then her executrix brought a bill against the remainder man, to have an account of the profits of the lands, which, by the articles, were covenanted to be settled in jointure. The remainder man had, *upon his marriage*, settled those lands upon his wife and her issue, but *with notice of the power* in the first tenant in tail to make a jointure. The Lord Chancellor dismissed the bill, there being no equity for the administratrix of the first jointress against the second and her issue, who was equally a purchaser with the first. But this case seems to fall more properly under the head of a non execution, than of a defective execution of a power.

Vide *supra*
185
obliv. on
this case. *et*
Alford v.
Alford,
supra 168.

And,

And although a court of equity, as has been shewn, will aid an appointment under a power *defectively* executed in favor of children, against the heir at law for the reasons above-mentioned, yet it will not, in such case, relieve grand-children; and cases may arise where even children will not be aided by the court; as, in cases wherein giving aid to the younger children will occasion a disinherison to the eldest; for, one principle, upon which the court interferes in favor of younger children against the heir, seems to be, that both parties claim under the same instrument, out of the same ownership, and under like considerations, namely, as creditors by virtue of the moral debt which equity raises from the parent to the child; which debt extends as well to the younger, as to the elder child. If, *therefore*, it appears to be the intention of the parent to pay that debt, by a just distribution of his property between the elder and younger branches of his family, and his property be sufficient to answer both purposes, a court of equity will aid a defective execution of that intention; to effect which, it considers the parent as having been absolute owner, and that, under that ownership, he might have disposed of the property as he pleased; that he, therefore, would *not* have suffered the heir to take the interest

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limited

limited to him, but under an idea that the younger children would likewise take the interest limited to them ; it therefore restrains the elder, (in such case) claiming by the same title as the younger children, from disputing their title ; considering for this purpose, the instrument that creates the power, and the instrument by which it is executed as one and the same. But, if the consequence of providing for the younger children will be, leaving the elder destitute, and that what will be equity to the one will be inequity to the other, because that, if the debt to younger children be paid, the debt to the elder must go unpaid, so that either way one must suffer ; in such case one party having no better title to the aid of the court, than the other party has, both being children ; the court does, in that case, what it does in every other case of equality of claim, namely, leaves things as it finds them. Both these points were considered and settled in the case of *Townsend v. Kettle*. There, one devised a copyhold to his grandson ; and *Sommers*, Lord Chancellor, decreed that the will was good, and that equity ought to supply a surrender in this case, as well as, in the case of a son ; for that a grandson was a son, and the grandfather was bound to provide for him : but the House of Lords

*Townsend v.
Kettle.*
1 Salk. 187.

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reversed

reversed this decree, and held, that equity ought not to supply such a defect in disfavour of the heir at law, unless it were in favour of a son or a daughter; and not *then* neither, if it were to disinherit the eldest son.

Mildmay's
case,
1 Rep. 175.
S. C. Jenk.
Cent. 247.
Cr. Eliz. 34.
Moor 144.
372.

And the judges seem to have argued in *Mildmay's* case upon similar principles. In that case *A.*, seised in fee of divers lands, and having a wife and three married daughters, *B.*, *C.*, and *D.*, covenanted, in consideration of blood, to stand seised, after other uses expired or determined, to the use of himself for life, the remainder for one-third to *B.* his daughter, and her heirs in tail, as to another third to the use of *C.* his daughter and her heirs in tail, and for the other third to the use of *D.* his daughter and her heirs in tail, with remainders over. And, if either of the three daughters should die without issue, then her portion should be by moieties to the survivors of the like estate, with remainders *ut supra*; with power to devise the said land, or any part of it for life or years, for payment of his debts or funeral, or other consideration; afterwards, *B.* died without issue, and then, *A.*, by his will in writing, for the advancement of his daughter *D.* and of her husband, and of the heirs
of

of the body of the said *D.*, limited a great part of the estate limited by the indenture for the portion of *B.*, and another part which remained to *C.* by the death of *B.*, to *D.* and her husband and to the heirs of the body of *D.* for 1000 years without reservation of any rent; and then *A.* died. And the question was, whether this limitation for 1000 years, being made for the advancement of his daughter *D.* and her husband, &c., was good *in law*, by force of the said proviso?

And it was adjudged, and that judgment affirmed in error, that this demise to *B.* for 1000 years was not good; First, Because an use cannot be raised by any covenant or proviso, or by bargain and sale, upon a *general consideration*; for, in such case, it doth not appear to the court that the bargainer hath *quid pro quo*, and the court ought to judge whether the consideration be sufficient or not, which it cannot do, when it is alledged in such generality. But, in such case, the bargainee may aver, that money, or other valuable consideration, was paid or given; and, if the truth be such, the bargain and sale will be good.

Secondly, That, when uses are raised by covenant, in consideration of paternal love,

&c., to a man's sons and daughters, or for the advancement of any of his blood, and, after, in the same indenture, a proviso is added, that the covenantor, for divers good considerations, may make leases for years, &c., the covenantor, in such cases, cannot make a lease for years to his son and daughter, or to any other of his blood (much less to any other person,) because the power to make leases for years was void when the indenture was sealed and delivered; for, the covenant, on such general consideration, cannot raise the use for the causes aforesaid; and, no particular averment can be taken, because his intent was as general as the consideration was; and, his intent was not, at the time of the delivery of the deed, to demise to any person in certain, to one more than another, but, to demise generally to whom he pleased; and therefore his power to make leases (the uses being created and raised by covenant upon the consideration aforesaid) was void *ab initio*. And the case at the bar was stronger, because the proviso which gave power to make leases would defeat, or, at least, incumber the estates vested and settled upon good considerations in strangers, by the covenant in the said indentures.

Thirdly,

Thirdly, It was held upon the words in the proviso "other considerations," that the word "other," could not comprehend any consideration mentioned or expressed in the indentures before the proviso; for "other" ought to be other in nature, quality, and person; and the advancement of his daughter, is the consideration mentioned before.

Fourthly, It was resolved, that the said limitation of 1000 years was as well, against the intent of the parties, as, against the words of the proviso; for, the intent and scope of the indentures was to make distribution of his lands amongst his three daughters and the heirs of their bodies; and every of them, upon good consideration and by agreement of parents, had her portion by herself; but, if this limitation for 1000 years should be good, it would rather frustrate the estate of the other sister, and defraud the intent of the parties grounded upon a consideration of marriage, than perform and pursue the intent and meaning of the proviso; for the intent of the proviso never was to give any power to make void the estates of the other sisters; but, it appears by all the parts of the indenture, that each daughter was to be advanced equally; and so this limitation for a thousand years, without any rent reserv-

ed, was against the intent and meaning of the parties: it seemed also to be against the words of the proviso, for that could not be called a reasonable consideration which tended to the subversion of the estates, vested and settled by the indentures upon so good and just considerations, against the meaning of the parties.

Now, it is observable, that the judges, in this case, formed their opinions on *two* grounds. First, They considered the strict law of the case, *upon which* they held, *clearly*, that the *covenant* to stand seised would *not* support *the term* raised.

Secondly, They argued, that, from *the circumstances* of the case, there were *no* equitable reasons why *it* should be supported: now the judges would never have taken the trouble to have argued upon the *latter* grounds, if they had not considered that the *former* ground was *not* a *complete* answer to the case, *at least*, not *in equity*, although it might be so at law: For, if the position had been that, *in truth*, *such* a covenant upon *such* consideration could, in *no* case, have been supported; *cui bono* debate, that, in the *particular* circumstances of *this* case, it *ought not* to be supported; because, whether it *ought*, or *ought not* to be supported was *not* worthy of consideration,

sideration, *when*, in *either* case, it would be *equally* void. We must, therefore, consider the judges, in this case, as arguing upon the supposition, that *such* a covenant *might* be supported, *in equity*, under *particular* circumstances, though not in law; or, as discussing a point *totally irrelevant* to the question before them. And this conclusion upon the bent of that part of the argument, in the preceding decision, which related to the equity of the case, seems warranted by the event of the case of *Prince v. Green*, which also occurred in *Chancery*. There a father, seised in fee of a great estate, by covenant to stand seised, settled the same in consideration of natural affection, to the use of himself for life, the remainder to his eldest son, with power to himself to lease a small part for forty years. He accordingly made a lease for the benefit of a younger child, which came by assignment to the plaintiff, and which the defendant, the eldest son, would have avoided at law, the power not being *well raised* by the *covenant* to stand seised. But, it appearing to the court, that the eldest son was greatly advanced by the father, and that the conveyance, which was *by covenant*, was *intended* to have been *by livery*, but which he was advised would be well made by covenant; Lord *Egerton* decreed, that

Prince v.
Greene, 6th
July, 40 Eliz.
cited, 1 Ch.
Ca. 161.
Ibid. 264, et
3 Ch. Ca. 91.

the plaintiff should hold the estate until the defendant evicted him by law; and that he should *admit* the power to make the lease to be good in law, if an entail was not proved paramount the settlement, which it was pretended there was.

1 Ch. Ca.
246. S. C.
infra.,
Mildmay's
case, 1 Rep.
175. Supra,
210.

Sir *Heneage Finch*, on citing the preceding case in that of *Smith* versus *Ashton*, observes; that the lease therein disputed was decreed good against the heir: First, For that the law was not then adjudged in *Mildmay's* case. Secondly, Because the son did claim by the same conveyance, as the power was limited by. And Lord Chief Justice *Treby*, in commenting on this case in that of *Bath v. Montague*, observes, that this power was not long after *Mildmay's* case, and the case in *Rolle's Abr. 1st, Part, Tit. Chan.* in which it was said, that when a case happens *dubious in law*, of the law respecting which, therefore, the parties cannot have conusance; *there*, aid shall be given by a court of equity, *even against a statute*. And to illustrate this position, *Rolle* puts this case, namely, as if, after 13 *Eliz. c. 10.* a dean and chapter had leased land to the king upon a valuable consideration, (*at which time* the law was understood to be, that, *the king was not bound by the statute*, so that such lease was *then* held to be good,) and suppose

1 Rolle's
Abr. 278.
Pl. 12.

pose the king had assigned that lease over, and *then* the law had been taken to be the contrary, namely, that the king *was* bound by the statute: yet *such* lease should be made good by the court of Chancery *against the statute*, because the law could not be known in a matter *so* dubious. And it is said, in the Abridgment, to have been so determined in the case of *Long* and the Dean and Chapter of *Bristol*. And, therefore, (*Treby* observed) that *the order*, in the case of *Prince v. Green*, said, that neither the party, nor his counsel, did *then* know *but* that *such powers* were warranted *in law* though by late judgments they were found to be void, and so it was impossible for them to prevent it. The court, *therefore*, did relieve, in that case, to make good the lease; and it was said that the elder brother who would have avoided the lease was an unreasonable man, and that this was a provision for a younger child.

This observation of Lord Chief Justice *Treby* explains what was said by Lord Keeper *Finch* to have been the first ground of decision in the case of *Prince v. Green*; namely, that *when* the power in the case of *Prince v. Green* was executed, *Mildmay's* case had *not* been determined. But that seems to be

be a very weak ground of argument, in support of the case of *Prince v. Green*, because, although it had not then been decided, that a power by proviso, to make leases *generally*, to whom the donee thereof pleased, (the uses being created, and raised by covenant, to stand seised in consideration of paternal love, or for advancement of the blood of the donor) was void, *ab initio*, for that a covenant on such a general consideration, to be executed in favor of a person uncertain, could not raise the use to the lessee, because the intent of the creator of the power is as general as the consideration, and is not at the time of the delivery of the deed to demise to any person in certain, to one more than another, but to demise generally, to whom he pleases; yet, the law was *then* clear, that a use could not be raised by any covenant or proviso, or by bargain and sale, to a person *uncertain* upon such *general* consideration. In this respect, therefore, it differed from the case in *Rolle*, as there put; for, the *principle* upon which that case seems to have been founded, is, that the law, at the time of the assignment of the lease there in question, was *understood* to be, *that the king was not bound by the statute of Elizabeth*; whereas *Mildmay's* case was only the application of a general rule to a particular instance. And, consequently, the strong and substantial ground, upon

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which

which Lord *Egerton* seems to have decided, appears to have been, *that both claims arise under the same conveyance, and one party was a child unprovided for.*

In the former case, the plaintiffs were children, the *provision* for whom was *defective* by an accidental *mistake* of their father, the defendant was a child likewise who was *amply* provided for. Both parties claimed under the same instrument. Both founded their title on the same ownership. Both had the *intention* of the owner *equally* in their favor. In the latter case, the parties were two daughters, having an equal claim upon, and equally provided for, by their father previous to the will in question. The object of the will was to destroy that equality of provision. He had failed to effect this purpose in law. In the former case every equitable ground interposed in favor of the younger children, *but, what* ground was there to apply to equity in the latter case? clearly none. For, tho' the *interposition* of a court of equity, in cases where there *is* equity, is of common right, yet, *that interposition* is to be governed *by discretion*, and must depend on *all* the circumstances of each case. The *equity* of these cases is not founded *merely* upon the *ownership* in the father, and *his intention* to dispose in favor of one child rather than

than of another, but it rests upon this, namely, that *the intention* is, an *equality* of provision *among those* who have an *equal* claim; *whicb* intention a court of equity will support, by injoining those, who oppose such equitable provision, from disputing the *legality* of the instrument *upon which* it is founded. But, if the intention be otherwise, a *court of equity* will not, *if* it be *incompletely* executed in law, *aid* such imperfect disposition, for, their interposition is not founded upon the general right a man has to dispose of his property as he pleases; but, *upon* his having made *a proper disposition* to persons, *each* of whose claims is founded upon *a consideration*, and who, *in respect* thereof, are *purchasers*.

And, upon this principle, Lord Ch. J. *Holt*, in his argument of the case of *Bath and Montague*, puts this case; if a man had settled all his estate upon his younger son for life, with a power to revoke *by deed* sealed in the presence of *three* witnesses; and had *then* made his will, and disposed of his estate *wholly* to his eldest son, and such will were attested (put it before the statute) *by two* witnesses, would this be a good revocation *in equity*? And his lordship held, that it would not; for, the one was as nearly related to the father as the other; the considerations

rations were equal ; one was as much a son as the other ; and, therefore, there was *no* great difference between them. Therefore the younger son who *had* the estate *by law* should enjoy it.

If an estate be conveyed to trustees, subjected to a power in favor of children ; and, afterwards, *cestui que trust* conveys his *equitable* interest on mortgage for a valuable consideration. If the mortgagee apply to equity to have a conveyance of the *legal* estate, it will *only* be decreed subject to the power : for, the title of either party being imperfect at law, and each having only an equitable claim the title under the power, being prior in time, will be *strongest* in equity.

Thus, where *W.*, father of *G.*, had, in *January*, 1643, conveyed tenements to trustees and their heirs, upon trust, that, if *G.*, within six months after his father's death, secured to the trustees 500*l.* for the benefit of *G.*'s younger children, *then*, after security first given to the trustees to convey the premises to *G.* and his heirs, as he should appoint : and, till the time limited for giving the security, the trustees to stand seised to the use of *G.*'s eldest son

T. for

Wallis .
Crimes,
1 Ch. Ca.
89.

T. for his maintenance ; and, in default of such security, the trustees, at the request of *G*'s, eldest son, to convey to him. In 1656, *G.*, father of *T.*, demised the lands in question to *S.* for 2000 years as security for 2000 *l.* by way of mortgage, *G.* being then in possession and taken as absolute owner ; and on a bill exhibited for the mortgage to be redeemed, or the mortgagee to hold discharged of equity, the court decreed the mortgagee to hold, but charged with the 500 *l.* to younger children.

A bill of review was brought to reverse this decree for error ; and the error alledged was, that “ in default of giving security in six months after *W*'s death, the trustees were to convey to *T.* and his heirs,” then the security was *first* to be given *before G.* was to have *any thing* in the lands, and that was become impossible, *G.* being dead, without having given any security. But the bill was dismissed, the court looking upon the *condition precedent* to be in the *nature* of a penalty, and *regarding the intent of the trust*, which was to secure 500 *l.* to the younger children, which, in the way the plaintiffs went in the bill of review, could not be.

And,

And, a court of equity will not only refuse its aid in support of a power *defectively executed*, if the object of it be inequitable. But it will relieve against an appointment under a power effectually executed, *in law*, in favor of a prior purchaser for a valuable consideration.

Thus where C. seized in fee of lands in *Derbyshire*, of the value of 800 *l.* a year, by his will dated 1 *June*, 1694, devised the same to his nephew R. O. remainder to R. O. his eldest son for life, and to his first and other sons in tail, remainder to S. his second son for life, remainder to his first and other sons in tail male, remainder over. *With power* for the said R. O. the younger, and S. as the premises should respectively come to them, by writing under their hands and seals, to appoint any part thereof, not exceeding a moiety, as a jointure for any wife for her life.

Scrope et al.
v. Offley et al.
4 Brown's
Ca. Parl.
237.

The testator died without altering his will, and then R. O, the son died without issue. But before his death, being in possession, a treaty of marriage was proposed between S. (then his eldest son) and U. whose fortune was about 8000 *l.* whereof 300 *l.* a year was in land. And, in consequence of this treaty, by indenture of the seventeenth *May*, 1700,
between

between *R. O.* and *S.* of the first part; *W. M.* guardian of *U.* of the second part, and *A.* of the third part, it was agreed that her real estate, when she came of age, should be conveyed to *S.* and his heirs, subject to such charges, and upon such conditions as therein mentioned; and *R. O.*, in consideration thereof, covenanted with *M.* to secure to *S.* and *U.* 250 *l.* a year for their maintenance during *R. O.*'s life; and also to settle upon them for their lives one moiety of *C.*'s, the original devisor's, estate of near 400 *l.* a year, to take effect upon his death, which moiety should be in full of *U.*'s dower, and that the same should be settled on all the sons of *S.* and *U.*, successively, in tail male; and it was agreed between all the parties, that the other moiety of *C.*'s estate should also be settled, after the death of *R. O.* and of *C.*'s widow, upon *S.* for life, and to his several sons in tail male successively. And that, in such conveyances, there should be trustees to preserve remainders as counsel should advise, and a power, as should be likewise advised, for raising 4000 *l.* out of *U.*'s real estate, for the younger childrens portions, and for raising 200 *l.* yearly for their maintenance in the mean time. Provided that, if *U.* when of age, should refuse to convey her real estate to *S.* and his heirs (subject to the charges

charges afore said) then the limitations to her for her jointure should cease. And it was further agreed, that all such other clauses provisoes, and agreements, as counsel should reasonably advise, should be inserted in such conveyance, to be made as afore said, as are usual in marriage settlements. This deed was executed by all the parties, and the marriage took effect.

By indenture of lease and release, dated 16, 17 of *May*, 1701, *R. O.* and *S.*, in consideration of the marriage then had and expressly declaring it to be in performance of the said marriage agreement, conveyed, to *M.* and another trustee, all *C.*'s estates, to the use, as to part, to *S.* for life, then to *U.* for life, then to *R.* their first son and the heirs male of his body, remainder to their second son in tail, with remainders over; as to other part, to the use of *R. O.* for life, then to *S.* for life, then to *U.* for life in full of her jointure, with remainder to *R.* the first son of *S.* in tail male, remainder to the second son in tail, remainder over; and, as to the residue to *R. O.* for life, then to *S.* for life, remainder to *R.* the eldest son of *S.* in tail male, remainder to the second son in tail male, remainder over. Provided that if *U.*, when she came

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of

of age, should refuse to convey her real estate to S. and his heirs, subject to such charges, and upon such conditions, as were mentioned in the said marriage agreement, then the limitations to her for life should be void. And the said R. O. and S. covenanted that they, or one of them, had full power to settle the premises as aforesaid, and that the same should remain and continue to and for the uses and trusts aforesaid, freed from all acts, estates, titles, charges, and incumbrances, made, committed, or done, *or thereafter to be made, committed, or done by them, or either of them.*

No notice was taken, either in the said marriage agreement, or in the settlement made pursuant to it, of the said C's will; or of the power therein contained, for making a jointure; or that R. O. or S. were only tenants for life of the said estate; but they agreed to convey and settle the same, as if they, or one of them, had been seized thereof in fee-simple, and covenanted for enjoyment accordingly.

By indenture dated the 4th of *May* 1704, and by fine, the said S. and U. (she being of age) settled all her real estate to the use of S. and his heirs.

R. the

R., the eldest son of *S.* and *U.*, died before *U.*, and, in 1711, she died, leaving *I. O.* her then eldest son, and *S. O.* her only younger child living.

In 1712, *S.* the father married *A.* whose fortune was about 1200 *l.*, but of which he had no more than 200 *l.* to his own use.

In 1761, *R. O.* the father of *S.* died; and by lease and release dated the 13, 14 of *January* 1717, the said *S.* settled an estate of 40 *l.* a year of his own purchasing, and also 65 *l.* a year, part of the said *U.*'s estate, and 9 *l.* 10 *s.* a year leasehold estate for 600 years, and also 1000 *l.* of *A.*'s fortune, in trust for himself and her for life, then to all her children by him in equal shares. And, by another deed dated the same 14 *January*, he limited to *A.* about 300 *l.* a year of *C.*'s estate as a jointure.

By deed dated 4 *September*, 1721, *S.* confirmed *A.*'s jointure, and added thereto as much more of *C.*'s estate as made the whole about 371 *l.* a year, which was not quite a moiety of it.

I. O. came of age in *Decem.* 1723, and came home. He was then, and at the time

of his joining in the deed and recovery after-mentioned, intirely ignorant of *U.* his mother's marriage agreement and settlement, and of all the other deeds and writings above stated, and of what provision his father had made or could make for *A.* or her children. But his father having then four daughters by *A.*, he and *A.* solicited and importuned *I. O.* to charge 3000 *l.* on *C.*'s estate for portions for those daughters, alledging that his father had nothing else to give them, and proposing that if *I. O.* would consent, that his father would at present allow him 260 *l.* a year for his maintenance, and at his death leave him the furniture of the capital house; but threatning if he refused, to keep him at home and allow him nothing. Under these circumstances *I. O.* was drawn in to execute certain deeds, dated 15 and 16 *June* 1734, which were prepared by his father's directions, and afterwards to join in a recovery: but he was not allowed to advise upon the deeds, and was assured and depended upon it, that they were for no other purpose than as aforesaid, there being nothing more proposed or asked of him. But it turned out, that he and his younger brother *S.* were thereby made only *tenants for life successively of C's estate, with remainder in strict entail to their respective issue male, remainder to S. the father*
and

and his heirs, and that a proviso was thrown in at the end of the deed, that nothing should in any wise impeach or make void the jointure theretofore made by S. the father to A. for life, in case she should happen to survive him, by virtue of a power given him by C.'s will.

S. the father by deeds, dated the 14th 15th of July 1725, confirmed the deeds of 13th, 14th of January 1717.

S. by his will, dated the 3d of Aug. 1726, devised all the said U's copyhold lands, together with several other premises, to A. and her four daughters, and gave C's whole estate, in case of a failure of issue male of I. O. or his brother S. O., to the four daughters and the heirs of their bodies. And he also gave them all his personal estate amounting to 4000 l. and made A. his executrix and died. Then A. brought an ejectment for the lands limited to her in jointure, and obtained a verdict.

I. O. (some time after his father's death, and not before) discovered and got into his hands, his mother's marriage agreement and settlement, and then, finding what large provisions had been made for A. and her
Q 3 daughter,

daughter, brought his bill in Chancery against *A.* and her daughters for a specific performance of his mother's marriage agreement, and to restrain *A.* from proceeding at law in the ejectment she had brought for her pretended jointure, and that he might be quieted in the possession of *C.*'s estate, and for a discovery of his father's real and personal estate, and that the indenture of the 16th *June* 1724, might be set aside, *as having been unfairly obtained.*

A., by her answer, insisted on all the deeds and provisions made for her and her children ; and alledged, that, on her marriage, the said *S. O.* told her, he could not, in his father's life time, provide for her and their children in the manner he intended ; but verbally promised, that, on his father's death, when the whole of *C.*'s estate would come to him, he would make her a handsome estate, and sufficiently provide for her children.

Upon hearing the cause, Lord *King* declared that *I. O.*, by virtue of the marriage agreement and of the settlement made pursuant thereto, was entitled to hold *C.*'s estate, *discharged of the jointure claimed thereon by A.* and decreed accordingly, and
as

as to the rest of *I. O.*'s bill, his lordship dismissed it. This decree was afterwards affirmed on an appeal to the Lords. The foundation of which was, that *I. O.* was a purchaser of *C.*'s estate, by virtue of his mother's marriage settlement, freed from the power vested in his father, by *C.*'s will, to make a jointure to any wife that he might take.

Vid. Fitzgib.
214, 215, 216.
as to a purchaser.

The next ground of relief in equity, in favor of appointments or revocations under powers defectively executed, "*is that of fraud;*" as where a party *interested* prevents a strict performance of circumstances, required in the execution of a power, from immoral motives. In such case, if he that hath the power do an act that *plainly* evinces his *intent* to execute his power, that *act* will, *in equity*, be a *good* execution of it.

Thus it was held by Mr. Baron *Powell*, Lord *Holt*, Mr. Justice *Treby*, and the Lord Keeper *Sommers* in *Bath* and *Montague's* case, that, if, in that case, there had been full and clear proof that the Duke of *Albemarle* had had a real intention to revoke the deed of settlement, but he had not known what he was to do in order to effect it, and had been hindered by the fraud and contrivance

Vid. 3 Ch.
Ca. 67.
Ibid. 122.
109. ibid. 84.
et supra 148.

of any person concerned in it in point of advantage from informing himself thereof; as if the deed had been in the custody of Lord *Bath*, and the duke, having a mind to revoke, had sent to the earl for it, in order that he might see what were the circumstances required and pursue them, and the earl had refused to deliver it, or had concealed it, in consequence of which concealment it had been impossible for the duke to know the true circumstances of his power; in such case it would have been reasonable that a court of equity should interpose and support it; because the earl, who was to have the benefit by the deed if it stood, was the *impediment* that prevented the forms, required in the revocation of it, from being *strictly* pursued.

And, on the last mentioned ground, a court of law would *also* dispense with a strict performance of circumstances.

Dyer 354.

Thus where *A.* made a feoffment to *B.* with a power of revocation, if *A.* at any time during his life, paid or caused to be tendered to *B.*, at the font stone in the cathedral at *Sarum*, 20 *l.*; *A.* tendered the 20 *l.* at the place in the absence of *B.* and without any notice to him to attend; this was

was held to be no revocation. But saith the book, *if he had sent to B. to be there, or to send some one for him, to receive the money at the tender, and B. would neither have come or sent, it had been a good revocation.*

So, in the case of *Pigott v. Penrice*, where the power was required to be executed in the presence of three persons not menial servants, Lord Cowper said, that, if a deed had been prepared and ready to have been executed, but three witnesses who were not menial servants could not have been got, *and this by the means of Pigott, who was to benefit by the non-execution of the power; the circumstances that occurred in that case, slight as they were, might perhaps, in such case, have been held a revocation and execution of the power.*

Comyns 294.
supra, 157.

Under this head of fraud, we may likewise include "*surprize*," which the civilians define thus, "*Surreptio est cum per falsam res narrationem aliquod extorquetur*," when a man will, by deceit or false suggestions, prevail upon another to do *that*, which *otherwise* he would *not* have done: as where a man was informed by his kinsman that his son was dead, *in order to get the father to settle his estate upon himself.* In such case there is

Per C. Just.
Treby, in
Bath v.
Montague.
3 Ch. Ca.
74. 89.

is no doubt but equity would set such a settlement aside. And the case would be the same if the appointee, under a power executed in his favor, to *prevent a revocation*, were to use any false suggestions or informations to the donee to mislead him and prevent him from executing his intention to revoke. *But surprize does not, in such case, mean merely something done suddenly or happening unawares, or done without precaution and deliberation.*

Per Lord
Sommers et
Lord C. J.
Treby.
Vid. 3 Ch.
Ca. 74, 114.
Duch. Albe-
marle v.
Lord Bath.

But fraud and circumvention are not things *to be presumed*, but must be *clearly* proved, or they will not be *regarded* in a court of equity.

Duchess of
Albemarle v.
Lord Bath.
2 Freem. 193.
Per Powell
et Treby Jus.

A court of equity will likewise aid a power defectively executed by reason of "*accident*"; as, where, from the local situation of the party, who is to execute a power, he is disabled from, and has not the means of, executing the power with the circumstances expressly required to attend the execution thereof. Thus, if a man were to purchase and settle lands in *Dale* of a certain value, and, *no lands being to be had there*, he purchased in *Sale*, this would be good in equity; so if a man were to do an act in a remote place, and *fell sick or was disabled* that he could

could not get thither, there, a court of equity might interpose : but, in such case, all that *could* be done in execution of the power *formally, must appear to have been done.*

So, likewise, it was said by Lord *Sommers*, Lord Ch. Just. *Treby*, and Mr. Just. *Powell*, in Lord *Bath's* case, that, if it had appeared that the Duke of *Albemarle* had had, while in *Jamaica*, an *express deliberate* intention and purpose to revoke, and he had done *acts to testify it*, and gone *as far* in pursuance of the circumstances as his condition *in those parts* would have *admitted*, that *might have come in* within the foundation of equity (to wit) *accident*. As if the Duke of *Albemarle* had made and published his will in *Jamaica* with an intention declared to revoke the deed then in question, and had had six witnesses to that his plain intention, *there being no peer to be had there*; that would have been a good revocation.

Duchess of
Albemarle v.
Earl of Bath,
3 Ch. Ca.
68. 89. 90.
126.

But, the intervention of death between a man's *resolving to execute* a power and *actually executing* it, is not, of itself, even in cases where the act is of such a nature as a man is under an obligation to perform, a ground for the interposition of a court of equity in favor of the person intended to have been benefited

benefited by the donee thereof, although some steps be taken towards completing such intent; for, although, in cases of provision for younger children or the like, a solemn act done by the parent, the nature of which the court will judge of, may, though ineffectual in itself, reasonably be aided in a court of equity, and such defective executions have been frequently aided; yet no determination has yet gone *so far* as to say that, where a man is only preparing to do an act, and he may or may not do it, those *preparatory* steps amount to such an execution of his power, as *a court of equity* will carry into effect. The case of *Smith v. Ashton* hath sometimes been cited as warranting a conclusion contrary to that which I have last mentioned, and is cited to that purpose particularly by Mr. Justice *Powell* in the case of *Bath and Montague*. But, in stating that case, he omitted a most material circumstance, which goes far to shew, that it cannot be considered as warranting that doctrine. And then, as the opinion of that learned judge, on that case, must be taken, not as an original opinion, but relative only to, and founded upon, the case as cited by him, it cannot be carried further than that case warrants.

In that case, *A.*, seized in fee, settled lands in *Yorkshire* upon himself for life, and afterwards to the use of his wife for life, remainder to his heirs of his body &c. in tail, remainder to his own right heirs. Provided that he might, by any writing under his hand and seal, charge the premises with the payment of such sums of money out of the same as he should appoint, so as the whole exceeded not 500 *l.* : *A.* was also seized in fee of other lands in *Cheshire* of the yearly value of 60 *l.* expectant upon the death of his mother. *A.* having an elder son and five daughters, *viz.* four daughters who were the plaintiffs, and one who died, and intending to make a provision for them, by deed, out of the premises before-mentioned, *C.* in the year 1665, prepared notes in writing, which *A.* declared should be the effect of his *last will*, and which were, as he called them, instruction for his *counsel* to draw up his last will in form; and the better to enable him so to do, he, together with these notes, sent to his counsel *the deeds concerning his Yorkshire lands*, and another deed concerning his *Cheshire* lands; and thereupon his counsel drew a writing and had the same ingrossed, leaving blanks for the names of the trustees; by this writing *A.* granted

Smith v.
Ashton.
Finch Rep.
273.
1 Ch. Ca.
263—265.
1 Freem. 308.
3 Keb. 55.
3 Ch. Ca. 69.

granted to these trustees and their heirs the reversion, (after the death of the mother,) of the third part of the *Cbesbire* estate, to the use of *R. A.* his eldest son for four years next after her decease, towards payment of such debts as his personal estate should be insufficient to satisfy, with remainder to *R. A.* and his heirs; and if he did not pay his daughters portions, then the remainder to him to be void, and then that the trustees should sell the *Cbesbire* lands, and, with the money arising from the sale thereof, should pay the daughters portions as far as it would go; and if that should not be sufficient, then he charged the said *R. A.* and his heirs males with the payment of the residue out of his *Yorksbire* lands, so as the same did not exceed 500 *l.*, according to the true meaning of the said deed.

A. died before this instrument was methodically drawn into a will by reason of the blanks left for trustees, and before he had executed the same.

Then *R. A.*, the son, married, and, upon his marriage, and in consideration of 500 *l.* his wife's portion, settled the *Yorksbire* premises without notice of these instructions upon his wife, with an intail to the heirs male

male of that marriage, and died. A bill was *then* exhibited by the daughters of *A.* against the wife and infant heir of *R. A.* for their portions.

It was contended on the part of the wife and infant son of *R. A.*, that they were in the nature of purchasers without notice, and, *therefore*, that these notes ought not to affect them; and that they being voluntary, and amounting neither to a will or a deed, (there being no trustees named and the paper not executed,) these defects ought not to be supplied *in equity* against an infant, especially as the *Cheshire* lands were the only support and maintenance of the infant.

On the other side it was argued, that, by these instructions, the lands were charged *in equity* with the said portions; and that, the trust thereof ought to stand and be supported by the court; and that, the heir of *R. A.*, on whom the lands had descended, ought to stand seized thereof, and take the same charged with the payment of the portions to his sisters; and that, although *A.* died before the writing was signed and sealed, yet that ought not to turn to the prejudice of the plaintiffs, he being prevented by sudden death from executing the same;
and

and that *A.* being dead, the plaintiff ought to have her proportion.

Hereupon a direction was given for a trial at law upon an issue, whether these notes were part of the last will of *R. A.*, and thereupon a verdict was given for them as a will; and then the chancellor, after taking time to advise, decreed the *Cbesbire* lands to be sold for payment of the portions, and immediate possession thereof to be given the younger children, and the infant to be charged on this account out of the *Yorkshire* lands so far as 500 *l.* if the *Cbesbire* lands, upon sale, should prove insufficient.

3 Ch. Ca.
106.

Now it is observable that Mr. Justice *Powell*, in citing this case in that of *Bath v. Montague*, was not aware, or, at least, did not take notice of the *most material circumstance* in the case, namely, the verdict in favor of the notes, *as a will*; for, if the court had thought itself warranted, in that case, to have aided the non-execution of that power, by reason of the death of the donee of the power intervening, and to have considered the notes *qua notes merely*, under the circumstances of that case, as an execution of the power, there was no occasion to have directed an issue. It is there-

therefore clear *from thence* that the court did not think the accident of the father's death before he had compleated his intent towards the younger children, a sufficient foundation for relief: it therefore directed a *trial* to ascertain whether *these notes* were a *will*, and it being found that they were, the question then was reduced to this, whether the court could relieve the younger children, in respect that the will wanted circumstances which were required by the power to attend the execution of it? which, as *between the younger children and the heir*, it certainly could do; the case being, by the verdict, a case of a defective execution only.

But the case went still a point further, and, in so doing, appears to me to have decided totally contrary to principle and precedent. For, the contest there was not between the younger children and the heir at law, in competition with whom, they had this in their favor, that though both were children, yet the younger were children unprovided for; which, if there is enough to provide for both elder and younger, is a good ground of relief in equity; but was *with the wife and children of the heir of the owner of the power*, who were purchasers of the *heir* for a valuable

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and

1 Vern. 406.
Supra 206.

and *good consideration*, and who, *therefore*, according to the decision in *Elliott v. Hele*, were indisputably intitled to hold the *estate*, under *the original settlement* by the deed, as purchasers for a valuable consideration, notwithstanding such defective execution of the power in favor of children by the will.

There is one case, however, in which the omission of a circumstance, will not, it seems by the better opinion, render the execution of a power defective in law though executed in favor of a volunteer; such execution will, consequently, be good in equity; and, that is, when the ceremony to be observed is *debors* the instrument of execution, as a tender of money, and the performance is dispensed with by the person interested therein and privy to the deed. Thus in the case of *Thorn and Newman*, cited 3 Ch. Ca. 68. 108. where *A.* covenanted with *B.* to stand seised to uses, with power of revocation upon a tender of 12 *d.* at a day certain, in the *Middle-Temple-Hall*, and *A.* tendered the 12 *d.* at the day to *B.*, who accepted it, but it was not in the *Middle-Temple-Hall*. The question was, whether this was a good revocation in equity? And it was held by Lord *Hales* to be a good execution of the power. And Mr. Baron

3 Ch. Ca..
68. 103.

Powell and Lord C. J. *Holt*, in speaking of this case in that of *Bath v. Montague*, held, that it would have been so in law likewise; for, upon a condition to pay money at such a day and place, if the money be tendered to the person at the day, though not at the place, that tender to the person is good, being a case of money; but it is not so in a collateral condition for doing any other thing.

But it was said by Mr. Baron *Powell*, that if the condition were to be performed *to a stranger*, that would alter the case. 3 Ch. Ca. 68.

But it is observable *upon the above case*, that though it had not been good at law, it might have been held to be so in equity, because there were children in the case, and it was to make provision for them. 3 Ch. Ca. 108.

5thly, With respect to some matters particular to powers of revocation.

No express words seem to be necessary to the creating of a power of revocation; for, although a proviso for that purpose be unskilfully penned, yet, if the intention be clearly to reserve such power, the court will construe the expressions used in creating the power, so as to support the intention.

R 2

Thus,

Bishop of
Oxon v.
Leighton,
2 Vern.
376, et vid.
Lavender v.
Blackstone,
infra.

Thus, where *P.*, on his marriage, by lease and release conveyed hereditaments to *H.* and his heirs, to the use of himself for life, remainder to his wife for life for her jointure, remainder over. *Proviso*, that, in default of issue of the bodies of *P.* and his wife, *H.* should convey to such uses as the survivor should appoint. *P.* devised the premises and died. The wife survived and appointed *H.* to convey to *W.* and his heirs, to the use of herself and her heirs; and, then she, by will, devised to the plaintiff in this suit and his heirs. The plaintiff could not recover at law, by reason that *H.* had not made such conveyance as *P.*'s wife directed; *et, per* Lord Keeper, the Lord Dyer's *Scintilla Juris* remained in *H.*, and, although the proviso was *unskilfully* penned, it *amounted* unto a *power of revoking and limiting* new uses: and it was decreed that the defendant should admit that *H.* had conveyed, according to the appointment of the wife, previous to her will by which she devised to the plaintiff.

Thompson et
Freston,
2 Roll. Abr.
262. 1.

And, such power to revoke may be given to the extent of the *whole* limitation of the estates subjected to it, or only as to *a part thereof*; as if a man make a feoffment to the use of *J. S.* for life with divers remainders over,

over, with power to revoke the estate *for life only*, and, that *then* another shall have *that estate*, and that the remainders shall continue as at first limited; that is a good power.

It was declared by the court, in the case of *Colston v. Gardner*, that, *wherever* there was a *power of revocation*, the law gave the revoker a *power to limit* new uses, although *no* power of new limitation were expressed in the deed; for, he that had power to revoke, had also power to limit. And *this* was said, by *Hale*, Chief Justice, in the case of *Fowler and North*, to have been so resolved upon as great a settlement, as any subject in *England* ever had.

Colston v. Gardner,
2 Ch. Ca.
46. S. L.
Lady Hastings's case,
cited 3 Keb.
7. Ca. 7.

3 Keb. 7.
Ca. 7.

And such *new uses upon a revocation* may be *limited* or *raised* by the *same* conveyance which revokes the ancient uses, as well as by a new conveyance; for, in as much as the *ancient* uses cease *ipso facto* by the revocation, without claim or other act, the law will adjudge *priority in the operation* of *one* and the *same* deed, although it be sealed and delivered at *one* and the *same* instant: and, therefore, *such deed* will be *first*, in construction of law, a *revocation* and *cesser* of the ancient uses, and *then* a *limitation* or *raising* of the new uses.

Digges's case, 6 Resol.
1 Rep. 174.
S. C. Moore
603.

Digge's case,
6 Refol.
1 Rep. 174.
S. C. Moore
603. S. C.
supra 111.

Thus, where *A.*, seised in fee, covenanted by deed indented, 6th of *May*, 10 *Elizabeth*, in consideration of marriage of his son and for other considerations, that he and his heirs would stand seised to the use of himself for life, &c.; with a *proviso*, for the considerations aforesaid, &c., that it should be lawful for the said *A.*, at any time during his life, with the consent of certain persons, by deed indented to be inrolled in any of the queen's courts, to revoke any of the said uses and estates and to limit new uses. *A.*, afterwards, 6th of *May*, 12 *Elizabeth*, with the consent, &c., by deed indented and inrolled in the Chancery, *revoked* the uses and estates in the first indenture limited in part of the land, and, *limited* the use thereof to himself and his heirs; afterwards *A.*, by another deed, 20th of *September*, 13 *Elizabeth*, with consent, &c., and inrolled in the Common Pleas *Mich.* 13 & 14 *Elizabeth*, declared, that, for the payment of his debts, &c., *from the time* of the inrolment of that deed in the Chancery, *all the uses* in the first indenture *should be void*, and that the *land should be* to the use of *A.* in fee: afterwards *A.*, by indenture, 26th of *October*, 14 *Elizabeth*, covenanted to levy a fine of all his lands, part whereof should be to the use of him and his wife and his heirs,
and

and the residue to the use of him and his heirs, which fine was levied in the same term accordingly : and, afterwards, the said indenture of the 20th of *September*, 13 *Elizabeth*, was inrolled in the Chancery, and then *A.* devised the lands over and died. The devisee entered into the land and made his claim. And, one question was, whether other uses might be limited or raised by the same conveyance which revoked the ancient uses? And it was held *per cur.* that they might.

And the rule of law will be the same, as to the ceasing of the estate, although the uses be raised by a *recovery*, and not by a covenant to stand seised. Thus, the court held, in *Fitzwilliams's* case, where, in order to distinguish that from *Digges's* case, it was argued that, in the latter, the uses were raised by covenant out of the estate of the covenantor, which might be more easily determined again in his possession, than, when uses were raised out of a recovery, (as they were in the former case,) by which there was a transmutation of possession, and all the estate *divested* out of him *who* limited and declared the uses. But it was answered and resolved by the whole court, that, for the reason and cause given in *Digges's* case, it was all one where he who made the

Fitzwilliams's
case, 6 Rep.
33. b. *infra*
248.

revocation was seized or possessed of the land; for, it was agreed in that case, that the best construction of the statute of 27 *Henry* 8. of uses, was to make them subject to the rules of the common law, according to which, if two acts were done by one and the same means, and took place in one and the same instant, the law would so construe it, that *that* act should be taken *in law* to precede, *which* would give *efficacy* to the entire instrument.

Nor will the *manner* of wording a power in such a proviso, so as to *distinguish* the *revocation* and *ceasing* of the former uses from the *limiting* the new uses, and *mark* them as *separate* acts, make *any* alteration in the *legal* construction thereof.

Pitwilliams's
case, 6 Co.
32.

Thus, where a recovery was suffered to divers uses, declared by certain indentures, in which was this proviso; namely, "provided always that it should be lawful to and for *W.* (from whom the estate proceeded) and *A.* his wife, *at any time* or *times* thereafter, and from time to time during their joint natural lives, at their free will and pleasure, by *any* their *deed* or *writing*, sealed, &c., to alter, change, determine, revoke, or make void, all, or any, of the use or uses, estate or estates, in those pre-
sents

sents before declared or mentioned, or limited of the same premises, or any part of them; and that at all times, "*from and after*" such time as the said *W.* and *A.* should, by *any such* deed or writing, have so expressed and declared their pleasure and mind to be to alter, &c., that "THEN," and "*from thenceforth*," such of the said estate and estates, use and uses therein declared, as should be so declared to be altered, &c., should *cease, determine*, and be void. And that "*then*," and from "*thenceforth*," the said recovery and recoveries should be, and all and every person, &c. should thereof stand and be seised, to the use of such, and those person or persons, to and for such, and those, use and uses, and in such manner and form, as *by such deed or writing, &c.* as was aforesaid, should be declared or limited only, and not to any other person or persons, use and uses.

Afterwards, *W.* and *A.*, by writing indented, sealed, &c., reciting the above indenture, the uses, and the power, *did revoke* the said uses, saving and except the use and estate limited therein to the said *W.* for life, the remainder to *A.* his wife for life; and, *by the same writing*, declared that
the

the said recovery should be to the use of the said *W.* for life, remainder to *A.* for life, remainder over, with the like power of revocation as before. Afterwards *W.* and *A.* died. And one question was, whether the revocation, and new declaration, and limitation of the said new uses were good and effectual in law? And it was argued that they were not sufficient in law; and one ground of argument against them was, because the revocation and limitation (as this proviso was penned) could not be in *one* and *the same deed*; for, in that, *three times* were to be observed, namely, the time of revoking, the time of ceasing the old uses, and the time of declaring new uses. First, The *act* of revocation ought to have been “by *writing*, sealed, &c.,” then came the second time, namely, “and that at all times FROM and AFTER such time as *W.* and *A.* by any such writing so expressed and declared,” so that there was a distinction of times, *viz.* “*from* and *after* such time, &c.” the former uses should cease, and “*after* they were ceased,” then followed the third time, “and that *then* and *from thenceforth*,” namely, *after* the time of the *cesset*, the said recovery should be, &c. to such uses, as by any such deed or writing, &c. should be declared and limited. In which case (*by such deed*) which was as much as to say,

“*per*

“ *per hujusmodi, or consimile scriptum,*” it ought to have been like in all circumstances ; as, to have been *their* joint writing, sealed and published as the other, but could not be *the same* deed ; for, the first deed was finished, when it was sealed and published ; and, *after that*, nothing could be added to it ; for *that*, by the publishing, was completed, and its time past : then, *after* that time, the time of the *cesser* ought to pass, and *then* came the time to declare new uses ; so that it was *not possible* that the *declaration* of the new uses could be *in* the deed of the revocation, but it ought to have been *in another deed* : and it was much enforced by these words “ *shall be,*” which was the future tense ; and, *thereby*, it appeared, that the revocation ought to have been passed before the new declaration should have been made, because, of the words “ *should be declared or limited.*” It was also objected, that, although *ex indulgentia legis*, the law, in divers cases, would, in construction, consider two distinct times in one instant, (which, in truth, was not any time) ; yet, no case could be put, *that* by any construction *three times* might be admitted in one instant : and, therefore, it was said, that this case differed from *Digges’s* case ; for *there* there were but two times, which well stood

stood with the learning of instants, and with the case of the fine there put. But, put the case that there were three conufors of a fine, and that the conufee render to one of the conufors for life or years a rent, and grant the reversion to another of the conufors for life or years rendering rent, and by the same fine grant a reversion in fee or in tail to the third conufor; it was said, that such fine should not be received, because that an instant could not be of more than two times. But, it was answered and resolved by the whole court, that the *ancient uses*, in the principal case, were revoked, and the *new uses* well declared in the *same* deed; because, First, In judgment of law, there were not in this case but *two times* concurrent in *one* instant, namely, the time of the ceasing of the former uses, and the time of the declaration of the new; for, although the *revocation* and the *ceasing* of the former uses were distinguished in *words*, yet, *in truth*, they were one; for, *the use* which was revoked, ceased, and *the use* which ceased, was revoked. Secondly; It was resolved, that, although no use ceased *until* the writing of revocation was sealed and published, and, *after* the sealing and publication thereof, nothing could be added to it, yet it well stood with the words of the proviso and the intention of the parties,

parties, that the *new* declaration might *be* in the *same* deed ; for, *both* being contained in *one* and *the same* writing, first, its operation should be to make a *destruction* of the *former*, and *eo. instanti* a creation of the *new*, uses ; and this word "*such*" more properly extended to the *same* writing in which the revocation was, *than* to another ; for, " by *such* writing," was as much as to say, "*per idem vel hujusmodi scriptum*," and so it should be taken in the principal case. And these words, "*should be*," should be said *future* in *respect* of the indenture, and, in judgment of law, *subsequent* also to the revocation ; and, although these clauses were *contradictory*, and *ex diametro pugnarent*, because the one destroyed and the other created, yet, the construction of the law (which delighted in making reconciliation,) made a *good accord* between them. For, to the intent that the new uses should be created, *the law* adjudged that the *clause of destruction* should have the *priority*, although both were contained in one and the same deed, and took effect by one and the same delivery.

Where a power of revocation is reserved, the estates, created by the deed in which such power is contained, may be defeated *several* ways ; namely, First, By an *express* revocation,

revocation, as was done in *Digges's* and *Fitzwilliam's* cases. Secondly, By a revocation in law. As where the donee of the power does an *act* of a nature that is *irreconcilable* with the existence of the former uses ; *quia non refert an quis intentionem suam declaret verbis, an rebus ipsis, vel factis* ; and when a man, having power to revoke, limits *new* and *other* uses, he *thereby*, signifies his purpose to *determine* and *alter* the uses before limited.

This idea of a constructive revocation seems not to have been allowed of, in law, until some time after the statute of uses ; for, *Scroop's* case was founded only on one authority, namely, the case of *Frampton* and *Frampton*, cited in that case to have been determined *Trin. 2 Jac.*, of which case I have not met with any report. The circumstances in *Scroop's* case were as follows.

Scroop's case,
10 Rep. 144.
S. C. 2 Roll.
Abr. 263.
10 Ja. 1. .

S., seised in fee of the manors of *H.* and *M.*, having issue *A.*, by indenture, dated 26th of *June*, 23 *Elizabeth*, for the preferment of *W.* his wife and *A.* his daughter, covenanted to stand seised of the said manors to the use of the said *S.*, *W.*, and *A.* for their lives, and, afterwards, to the said *A.* and the heirs of her body, with remainders over ;

over; with a proviso that, if the said S., during his life, should be disposed either to determine, disannul, change, alter, enlarge, diminish or make void "the uses, or estates, or any of them of the premises, or any part thereof, that *then* it should be lawful to and for the said S. at all times, at his pleasure, by *his writing* indented under his hand and seal, subscribed in the presence of three witnesses to determine, disannul, &c.: and *also* by the *same* writing at his will and pleasure, or *any other* writing whatsoever, signed, and subscribed as above, to limit, declare, and appoint the uses of the same to the persons aforesaid, or to any other persons, &c." W. died, then S. married E., and, by indenture of *November, 33 Elizabeth*, subscribed in the presence of three witnesses, in consideration of a jointure, to be made to the said E., *covenanted with trustees to stand seised* of the manor of H., to the use of S. and E. for *their* lives, and, afterwards, to the use of the right heirs of S., &c.; and other conveyances of the fee simple were afterwards made. And hereupon the question was, whether the indenture of the 33 *Elizabeth* was a good revocation and re-appointment according to the power? and it was resolved so to be; for, although, in this case, there was not *any express* signification
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of S.'s purpose or resolution to determine, disannul, &c.; yet, *for as much as* he, by the said indenture of 33 *Elizabeth*, covenanted to stand seised to the use of himself, and the said E. his then wife, and afterwards to his right heirs, *this* inured to two intents : 1st, *To declare* his purpose and resolution to determine, disannul, &c., and, *thereby*, the *former* uses ceased *ipso facto*; and, 2dly, The covenant in the same indenture inured *to raise a new* use to the said S. and E., and to the heirs of S.

Cited,
3 Keb. 511.
538. et vid.
1 Vent. 290,
1. in Com.
Ban. 6 Car.
1.
Vid. reason
supra 111.

It was held by Lord *Hale*, (on observing upon the case of *Ingram* and *Parker*,) contrary to the opinion of the three judges who decided it, that a bargain and sale, although it were *not inrolled*, would be a good execution of a power within the reasoning in *Clere's* case; namely, as an act of the donee of the power, which could not have *any* operation, *unless* it could take effect as an execution of the power, because, the deed of bargain and sale, *without enrollment*, would be void, unless it could take effect as *an appointment* by virtue of the power.

It is observable, upon this opinion of *Hale*, on the case of *Ingram* and *Parker*, that it may be supported without at all infringing

ing upon the principle of those cases in which it hath been held that, where a power is limited to be executed by a devise, a devise made in execution of it, will not be *valid*, unless it have all circumstances necessary to convey the same species of property, where it is not to operate in execution of a power: for, where a power is limited to be executed by a devise *generally*, the law implies *from thence* that the creator of the power required all circumstances, necessary to a valid devise of that which is the subject on which the power is to operate, to attend the execution of such a power, as pointedly, as if he had expressly *delineated* each circumstance *essential* to a valid will in the limitation of the power. And a similar argument would have applied in the case of *Ingram and Parker*, had the power *there* been expressly *limited* to have been executed *by bargain and sale*; because, in such case, an implication would *necessariy* have arisen, that the donor of the power meant that *inrollment* should be one circumstance attending the execution of it; for, as he required it to be executed by bargain and sale, it must from thence have been inferred, that every thing necessary to the constitution of that species of conveyance was meant by the creator of the power to be

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pursued in the execution of it. But, in the case of *Ingram* and *Parker*, as it occurred, the question was not, whether it was the *intention* of the donor that the power *should* be executed by *bargain and sale*; for *no* provision was made as to the particular species of conveyance by which the power was to be executed; but, whether the donee of the power *intended* the instrument to *take effect* as a bargain and sale, or, as *an execution* of the power; and it was perfectly clear that he intended to execute the power; if that were so, then, the question would be, whether he had *complied* with the *circumstances* required by the donor? for, if he had, there could be no doubt but that his act ought to be supported, if it could so be, consistent with the rules of law: because, in consideration of law, his *act*, if attended with the forms required by the power, was as *the act* of the *donor* of the power taking effect out of *his* ownership. Then the case fell *exactly* within the *principle* of *Scroop's* case, *viz.*, it was clearly intended by the donee of the power to be an *effectual* conveyance; it could *not* operate *as such*, as a bargain and sale for want of inrollment, then it must be considered either as *merely a deed* made in *execution* of the power, or as a *void* instrument;

ment; but, *ut res magis valeat quam pereat*, it ought to be considered as intended by the donee to *take effect* under the power; and *not* as a bargain and sale; in which *latter view* it would be void for want of inrollment.

Thus, where the execution of the power of revocation was *expressly* required to be by deed indented to be inrolled; it was resolved, that that was as much as to say by deed indented *and inrolled*; for, no revocation should be made, in that case, until the deed *were* inrolled: as, if it should operate as a revocation *before* the inrollment in such case, then *probably* the deed would never be inrolled; which would be against the words and intent of the creator of such power.

And, if the donee of a power of revocation require that the instrument, by which he revokes, shall be inrolled in a particular court, it will not take effect, *as a revocation* of uses under the power, *until* that be done; and, accordingly, it was resolved in *Digges's* case, that there was no perfect and complete revocation by the indenture of 20th of Sept. ann. 13 Eliz. until the indenture *was inrolled* in Chancery; for, although the proviso

2d. Resol.
in Digges's
case, 1 Rep.
173, b.
S. C. supra
12, 16, 26.

Digges's
case. 3d
Resol.
1 Rep. 173.
S. C. supra.

of revocation in the first indenture in that case, would have been satisfied by an inrollment in any of the king's courts, (as in that case it was in the Common Pleas) ; yet, inasmuch as the *indenture* of revocation itself *limited* the revocation to take effect, *after* the inrollment thereof *in the Chancery*, for that reason, there was no *perfect* revocation, *until* it was inrolled *in the Chancery*.

A *feoffment* made for further assurance, will not be a revocation of a covenant to stand seised to uses with power of revocation.

Sir James
Perrot's
case, 2 Roll.
Abr. 795. 8.
S. C. Moore
368.

Thus, where *A.* covenanted by indenture, in consideration of natural love and affection, to stand seised to the use of himself for life, the remainder to *B.* his son for life, remainder to *D.* his reputed son (he being his bastard) for life, with divers remainders over; and also covenanted to levy a fine and to make a feoffment or other assurance, at the request of the covenantees, for further assurance, which should enure to the same uses : with a proviso that “ if he, by a writing, &c., should revoke, alter, change, diminish, enlarge, or otherwise limit, appoint, or dispose, to or with any other person, or
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in any other manner and form, any use or uses, estate or estates, interest, or limitation by the said indenture given, limited, or conveyed, to any other person of the estates in question; that then the said *A.*, and every other person, should be seised to the said uses." *A.*, afterwards, made a feoffment in fee to the said covenantees, in performance of the covenants in the said indenture, to the same uses, intents, and purposes, as were in the said indenture declared, limited, and appointed, and to no other, but the uses were not recited in the deed of feoffment; there being only a general reference to the indenture: the question was, whether this feoffment could be considered as an *independant* assurance, conveying the estate, among others, to the *bastard son*, and so a *revocation* of the covenant to stand seised; because, otherwise, *he* could not take any estate, as the covenant to stand seised would not raise any use to him? And, it was held, that this feoffment was *not* an *independant* act, nor any revocation of the uses raised by the indenture, nor did it give any estate in remainder to *D.*, the bastard son, it being made *only* for further assurance according to the *covenant*.

Vid. Lord
Leicester's
case, *supra*
68.

A power of revocation may be executed by several instruments ; as by fine and deed ; for, all of them taken together will be considered as only one assurance.

And such power may also be executed at different times, over different parcels of the estates subjected thereto.

Sir Richard
Lee's case,
1 And. 67.

Thus, where *L.* levied a fine of the manors of *S.*, *L.*, and *B.*, together with other lands, and, afterwards, by indenture between himself and the conuzees, declared, that the same should enure to certain uses in the said indenture mentioned ; with a proviso that, if " the said *L.* should be minded to alter or determine any of the said uses, to the intent to alien or sell *any part* or *parcel* of the premises, and declared such his intent by writing under his hand and seal, that then they should be seised of such part or parcel as the said *L.* should declare his intent to sell or alien, to the use of the said *L.*, his heirs, or assigns, any thing before-mentioned to the contrary notwithstanding." Afterwards *L.*, according to this proviso, declared by writing *as to part* of the land mentioned in the fine, that he was minded to alter the uses thereof with intent to alien it. Then, by another deed, he

he declared his intent and mind as to the manor of *L.* was to alien and sell that. And, afterwards, by another writing, he declared his intent and mind as to all the residue of the premises mentioned in the fine, was to alien it, &c. And the question was, whether, upon this proviso, which gave liberty to alter the use or uses for part or parcel, &c., he might make the several declarations stated? And it was contended that, when *L.* had, according to the proviso, *declared* his intent that part should be aliened, and, thereby, executed the liberty given him, which was to alien part, but not all, and when he had *altered* the uses as to part, he could not afterwards alter them as to the other part; for, of part he had made his election, and, therefore, ought to have held himself content. But, the court were of opinion, that the first uses were, by the deed, altered as to the said manor of *L.*; for, it appeared that it was the intent of *L.* to have liberty to dispose of any part at his pleasure, and that manor was but part, therefore this was within the words of the proviso, notwithstanding that *L.* had *before* aliened another part.

But, some doubt was entertained, whether *L.* might have altered the uses for all
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Sir Richard
Lee's case,
1 And. 67.

the premises or not ; because he had reserved liberty only for part, and not for the whole. But, the reporter says that, considering the case, and that the intent appeared, that *L.* might have aliened all and *every* part, or parts *only*, as he had pleased, it was reasonable when part of a deed tended one way, and part of it another way, the intent to be reasonably taken upon the words, should be taken, and the law be according to that.

Digges's
case, 1 Rep.
173, b. 1st
Resol. S. C.
Moore 603,
S. C. *supra*
259.

Accordingly, in *Digges's* case, where the power (as to this point) was to revoke, "*at any time*" during the life of the donee thereof, any of the uses or estates and to limit new uses ; it was resolved, as stated by Lord *Coke*, that the donee of the power might revoke part at one time, and part at another time, and so of the residue until he had revoked all ; for, these words "*at any time*" amounted to as much, and were, as if he had said, "*from time to time* as often as he should think good."

Moore 603,
605.

But, as this case is stated in Sir *T. Moore's* Reports, the resolution in *Digges's* case exactly concurred with *Anderson's* opinion ; for, it is there stated to have been resolved, First, That the words in the proviso, that it should
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be lawful for him at any time during his life, &c., should be intended *toties quoties* during his life, and not restrained to *one time* in his life. Secondly, That the words, *any use or estate of the premises or any part thereof*, should be intended as well one part at one time, as another part at another time; and not be restrained to an election to make a revocation at one time of all or of any part, and no revocation *afterwards* of any other part.

A power of revocation may be executed conditionally. Thus, where *A.*, seised in fee, made a settlement of the estates in question, with power of revocation; and, seven years afterwards, mortgaged the same in fee to one of the remainder-men in the settlement; and the condition of the redemption was, that, if the mortgagor or his heirs paid the money at the day, he should have the lands in his former estate: the question was, whether this mortgage was a total revocation, or only *pro tanto*? And the Lord Keeper declared, that it was a revocation *pro tanto* only, the mortgagor being to have the lands on payment, as in his former estate; and it was decreed accordingly.

But, Sir *Joseph Jekyl*, in giving his opinion in the case of *Fitzgerald* and Lord *Faucon-*

Thorne v. Thorne,
1 Vern. 148.
182. S. L.
Perkins v. Walker,
1 Vern. 97.

Fauconberge, said, that he knew of no case but that of a mortgage, wherein equity controled a power of revocation; and the reason of that case was, because the mortgagor *in equity* continued to be still owner of the estate, it being considered *there* but as a pledge for the money. And the decision in that case seems to go a great way in support of Sir *Joseph Jekyl's* opinion.

Fitzgerald et
al. v. Lord
Fauconberge
et al.
3 Brown's
Parl. Ca.
543. S. C.
Fitzgib. 207.

There, *F.*, being unmarried and having no child, and being seised of estates of large annual value, did by lease and release, dated the 2d and 3d of *July*, 1712, as well for settling the said premises in his name and blood, to the several uses, trusts, and purposes, and in such manner as therein after limited, "with liberty nevertheless, to and for him the said *F.*, freely and clearly at his will and pleasure, to dispose of, charge, or alienate the said premises, or any part thereof, for any estate or estates whatsoever, as he should think fit; and to revoke, recall, and make void all and every the use and uses, trusts, limitations and appointments thereby raised, limited, and appointed, mentioned and declared concerning the same, as also in consideration of 5 s., convey to trustees and their heirs all the estates, to the use of himself for life, with remainders over."

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There was also a term created, among other things, by sale, mortgage, or demise thereof, for the term, or any part thereof, to raise all such sums as *F.* should owe at his decease, and also all such sums as he, by his last will, or any other deed or writing executed under his hand and seal, in the presence of two or more witnesses, should give and appoint to be paid, or charge the premises with, to any person or persons whatsoever: but, if the person, next in remainder expectant on the term, should pay all the said debts, annuities, and monies, so to be devised or appointed, then the term was to cease. Then followed these provisos: First, "A proviso or power for the said *F.*, from time to time, by any deed or writing under his hand and seal, to be signed and duly sealed and delivered in the presence of two or more witnesses, to demise, lease, limit, or appoint, the said premises or any of them to any person or persons whatsoever for any term, or terms whatsoever, for so much yearly rent, as the said *F.* should think fit, and with such other conditions and agreements as the said *F.* should please." Secondly, "A proviso, that if any female, who, according to the limitations, ought to inherit the premises, should marry any person, without the consent of the trustees,

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tees, or should marry any person that should be a Protestant, and not of the communion of the church of *Rome*; that then, and immediately after such marriage, all the estates before created and appointed for the benefit of such person, so marrying, should cease and be void." Thirdly, a proviso, "that it should and might be lawful to and for the said *F.*, at any time or times during his natural life, at his will and pleasure, to grant, sell, or demise, the thereby granted premises or any part thereof; or, by any deed or writing under his hand and seal, or by his last will and testament in writing, signed, sealed, delivered, and published, in the presence of three or more credible witnesses, to revoke, repeal, and make void, all, every, or any of the use and uses, estate and estates, trusts and limitations before raised, created, limited or appointed; and, to declare and limit the same, or such other new uses, as should seem most meet and convenient to the said *F.*; and then and from thenceforth, the estates and uses before limited and appointed, and so revoked and repealed, to cease and determine and be utterly void, as if the same had never been made, limited, and appointed; and, that the said *F.* should and might dispose of the said premises, and every part and par-

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cel thereof, to such other person and persons, use and uses, as he should think fit, any thing before mentioned to the contrary in any wise notwithstanding."

By other indentures of lease and release, dated the 25th and 26th of *September*, 1715, made between *F.* of the one part, and *T.* and *W.* of the other, reciting, that *F.* stood indebted to several persons named in a schedule thereunto annexed in the several sums therein mentioned; he, as well for securing the said debts and more speedy payment thereof, and in consideration of 5 s. as also for other good causes, conveyed, to *T.* and *W.* and their heirs, the premises, upon trust that they or the survivor of them, &c., should, out of the rents and profits of the premises or by mortgage, &c., raise so much money as should be sufficient to pay all the debts mentioned in the said schedule with interest, over and above the several annuities, rents, and rent-charges in the said schedule mentioned, wherewith the same premises stood charged, and pay the same in full discharge of the said debts and interest; and, after payment thereof and their own charges being satisfied, that "they should pay the overplus thereof (if any), and reconvey such part of the premises as should remain unsold, to the said *F.*, or to such person

son and persons, and to such use and uses, estate and estates, as the said *F.* should, by any deed or writing under his hand and seal, attested by two or more credible witnesses, limit, direct, and appoint the same. This indenture was attested only by two witnesses, and remained in the custody of *W.*; the trustee, till his death.

Then, by indenture dated the 26th of *September* 1715, executed by all the said three parties, reciting the lease and release of the 25th and 26th of *September* 1715, it was declared, that it should and might be lawful for the said *F.* at any time or times thereafter during his life, at his will and pleasure, by any deed or writing under his hand and seal, attested by two or more witnesses, or by his last will in writing, attested by three or more witnesses, to revoke, repeal and make void, all or any of the trusts and estates in the said indenture of release of the 26th of *September* 1715, raised, created, limited and appointed of the said premises, and every part thereof; and to declare, limit, and appoint the same to such other use and uses, as should seem most meet, and convenient to him; and that, from thenceforth, the trusts and estates so revoked and repealed, should cease and be void, as

if the same had never been created, limited, or appointed; and that it should and might be lawful for the said F. to dispose of the same premises or any part thereof, to such other person and persons, use and uses as he should think fit.

F. died on the 24th of January 1716, having made no appointment or disposition of the estate after the execution of the deeds of 1715.

And, upon these several instruments, a question arose between the heir at law of F. and the claimants under the settlement of 1712, whether the deed of September 1715, for securing the creditors of F. was not a revocation of the settlement of 1712, pursuant to *some* or *one* of the provisos therein contained? It was contended on the part of the claimants under the settlement of 1712, that if these deeds of 1715 were deemed to be a revocation of that settlement, (which upon other grounds it was argued they could not be) yet, they could not be a total revocation; because it was admitted, that those deeds operated *only* as an implied revocation, by reason of their inconsistency with the settlement of 1712; and, therefore, were no further a revocation, than such
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inconsistency extended: then, the release having conveyed the premises in trust to raise money for paying the debts mentioned in a schedule thereunto annexed, and afterwards to reconvey to *F.* or such persons or uses as he should appoint, without saying to *F.* or his heirs, or limiting the estate in default of appointment, which was the case that had happened, it was apprehended that the release of 1715, was no further inconsistent with the settlement of 1712, than as to the particular uses specified in that deed, and consequently, as to the rest of the estate, did not revoke the settlement of 1712; and that, under those circumstances, a court of equity ought to restrain it from operating any further, than to satisfy the particular purpose. It was argued on the other side as to this point, that, *F.*, having, by the deeds of 1715, conveyed the fee and inheritance of the whole estate to *T.* and *W.* upon trusts and for uses utterly inconsistent with those of the settlement of 1712, this latter conveyance must consequently be a *complete* revocation of the former; the legal estate being vested in new trustees, who could be seised thereof upon no other trusts than the new ones, and *F.* having made no subsequent appointment of such part as should remain unfold, after the particular purposes were

were answered, a trust must therefore necessarily result for the benefit of him and his heirs, according to the established rules both of law and equity; consequently, there could be no foundation for a court of equity to controul or abridge the operation of the deeds of 1715, by confirming them to be only a revocation *pro tanto*, merely to disinherit one of the co-heirs at law; and of this opinion was Lord Chancellor King, assisted by Sir Joseph Jekyl, and Lord Chief Baron Reynolds: and it was decreed accordingly. And on appeal to the House of Lords, the judges having delivered their opinions *seriatim* upon the question, whether the deed of 1715, were a revocation of the deed of 1712; and if so, whether the said deed of 1715, were a total revocation, or a revocation *pro tanto*? it was ordered that the appeal should be dismissed, and the decree affirmed.

Where an estate is conveyed to uses with power of revocation but not to limit new uses, no new or other use can be *avered* or *declared* under *the* assurance that creates the power; for, in such case, the uses of the original conveyance are *exhausted* by the revocation, the power being only to revoke and not to limit new uses: and if, in such

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cases, *new* uses are declared, they must be *limited* by deed or fine *to take effect* out of the *interest* of the revoker, as they cannot take effect out of the original conveyance.

Becket's case,
Lane 119.

This question seems to have been first agitated in *Becket's case*. There *R. B.* seised of lands in fee, 36 *Eliz.* levied a fine, &c. and declared the use to be to himself for life, and, afterwards, to *T. B.* with power of revocation, and to limit new uses, and if he revoked and did *not* declare new uses, *then* the fine to enure to the use of himself for life, and afterwards to *H. B.* in fee. *R. B.* revoked by indenture, and declared new uses with power also to revoke and limit new uses, and *that then the fine should be to such new uses and no other*. Then *R. B.*, by a third indenture, revoked the second indenture, and declared the use of the fine to be to the use of himself for life, and after to *H. B.* in tail, the remainder over. Then *R. B.* died; and a question arose, whether the limitation of uses by the third indenture was good under the power? and *Bromley* and *Adams*, Barons, held, that the declaration of uses made by the third indenture was good, and that *R. B.*, having power by the first indenture to declare new uses, might declare them with power of revocation; for, it

it was not *merely* a power but conjoined with an interest, and therefore might be executed with a power of revocation; and, *then*, when he, by the third indenture, revoked the former uses, it was as if no uses had been declared, in which case he might declare uses at any time after the fine; and they relied upon *Digges's* case, where it is said, that, upon such a power, a man can revoke but once, unless he has a new power of revocation of uses *newly* to be limited; whereby it is implied, that, if he has a new power to revoke the new uses he may revoke them also. But *Snig*, Baron, was of a contrary opinion, and held, that he had not power to declare ~~three~~ several uses by the *first* contract, which ought to authorize all the declarations upon that fine. If so, then the revocation by the third indenture was good, and the limitation void; and *Tanfield* held, that the uses in the second indenture stood unrevoked, and the new uses in the third indenture were void. The power in the second indenture, he said, was, that he might revoke and limit new uses, and that the fine should be to those new uses and to no others: and, then, if there were a revocation, and no *punctual* limitation, he had not pursued his authority; for he ought to revoke and limit, and he could not do the one without the other: also he said, that,

after such revocation and limitation, the fine should be to such new uses and no other. Then, if there were no new uses *well limited* in the third indenture, the former uses should not be void.

From the very loose manner in which the preceding case is reported, it is no easy matter clearly to understand the foundation on which the judges respectively rested their opinions thereon. There is no question, but that, where there is a power of revocation and of limiting new uses with an interest, the *new* uses limited on a revocation, may likewise be limited with a power of revocation, and so on *toties quoties*; and, in this opinion, they seem to have concurred; but, they appear to have differed upon the operation of the word "*limited*," and of the word "*declared*," and the consequence of inserting them in the power. All the judges agreed in *this*, that there was a *distinction* between the construction to be put on the word "*limited*," and that to be put on the word "*declared*;" for, *Bromley* and *Adams* did not found their judgment upon the ground that the third indenture had pursued the power in limiting new uses, but they argued that it revoked the uses of the second indenture only, and, that the operation of the
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the revocation was to make it, as if no uses had been originally declared upon the fine, in which case, they contended, that *R. B.* might have declared uses at any time; they therefore did not rest the uses, under the third indenture, upon the original indenture declaring the uses of the fine, as they would have done, had they considered the third indenture, as an execution of the power in the *second* indenture, which was raised out of the power in the *first* indenture; but they considered it as an independant act, and as an original declaration. But *Snig* and *Tanfield* held, that the word "*limited*," in the second indenture, must operate strictly, and must be taken as restraining the revoker *actually* to limit new uses by a new grant or covenant upon consideration: and that the term "*limit*," in the second indenture, was therefore not satisfied by the declaration in the third deed, *that the fine should enure to the uses therein mentioned*. For, they held that (the fine, having been at first declared to enure to certain uses with power to revoke and to limit new uses, and *R. B.* having executed that power with a power of revocation and *limitation only*, and *not* of declaration,) the original fine could only enure to the express uses thereof, namely to the uses limited with power of revocation and

limiting new uses ; and, then, when R.B. by the third indenture revoked the second indenture, and declared the use of the fine to be to the use of himself, &c. he did not pursue the power ; for, such declaration was not warranted either by the first or second indenture, but a strict limitation only was warranted thereby. And therefore *Snig* said, that the third *declaration* was not warranted by the power, and, consequently, that the fine would not enure to the uses thereof. And *Tanfield* said, that for want of a *punctual* limitation, the power had not been pursued, thereby *clearly* distinguishing a *punctual limitation*, which there had not been, from a *declaration*, which there was : and therefore he held, that there could be no new declaration of uses of the fine, *that* not being warranted by the power : the consequence of which was, that, either the uses of the second indenture must stand, or, the uses declared being determined, the estate must result, and the trustees thereof must be seized to the use of the original cognizor and his heirs.

1 Inst. 111.
b.

And the opinion of *Snig* and *Tanfield* seems to have been consonant to law ; for, although a revoker may limit new uses, when there is no express power so to do, yet, those new uses cannot take effect as uses *spring-
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ing out of the original conveyance, but must take effect out of the interest of the revoker, as a new limitation of the use; and the reason is, that, the old uses ceasing by the revocation, and there being no express power to declare new uses, the estate out of which the old uses arose becomes free from them; for, that estate was only bound by the uses limited thereon with power of revocation, and the consideration extended to those uses only, and, consequently, after revocation, it was freed from them: but, every power of revocation giving an interest, in the estate out of which the uses arise, to the revoker, he may, upon a consideration, *limit* new uses to enure out of that interest, though he cannot *declare* new uses upon the original conveyance: if, therefore, a man make a feoffment, or levy a fine, and declare uses, and reserve a power to revoke them *without saying more*, he cannot revoke them, and *declare* new uses under the feoffment or fine; for, the use of the feoffment, or fine, being *once* declared by the indenture, no other use can be averred or declared thereof, which is not warranted thereby; for, a man cannot declare a fine or feoffment to be to new uses, when the uses thereof have been *once* declared, although the first uses be determined, unless *power* be reserved to *de-*

8 Rep. 76.
9 Rep. 10,
11.

declare new uses ; in which case the fine enures to the power. Thus, if a man declare the use of a feoffment or fine, to be to one and his heirs, upon condition that he shall pay 40 l., &c., or until he do such an act, if the first use be determined, the feoffment or fine cannot be declared to be to new uses : for, all the uses which are to arise out of the feoffment or fine, ought to spring from the first indenture, which testifies the intention of the parties in the making or levying thereof. Upon this ground the second indenture, in the principal case, and the limitation of new uses thereby, were well warranted by the first indenture ; for, there was a power reserved therein to revoke and *declare* new uses. And in respect that the power, in the principal case, was not a naked power only, but with an interest, the new uses might be upon condition, or upon a power of revocation to determine them ; but the declaration of the third uses by a third indenture, after the revocation of the uses limited by the second indenture, and re-limitation with power of revocation and to limit new uses, was not warranted by the first or second indenture ; for, the power in the first indenture was exhausted by the second indenture, and the power in the second indenture was to *limit* and not to *declare*, and without such warrant

warrant there could be no *declaration* of any new uses of the first assurance which was not authorized by the first indenture.

As, in such case, therefore, if the revoker limit new uses, not being expressly warranted by his power so to do, or, if warranted, then, not exactly pursuant to the terms of the power, such uses cannot enure upon the original conveyance, but must take effect out of his interest; they must, consequently, be limited upon a *new grant*, or by *covenant* upon a *consideration* expressed; the consideration of the original uses not extending to the new uses limited upon the revocation. The two following cases will illustrate the principles here laid down.

The first arose upon a trial at bar for lands in *Staffordshire*, and the case was thus. *R. B.*, having issue only one daughter married to *E.*, levied a fine, and by indenture declared the uses to *R. B.* and his heirs males, remainder to several of his brothers and the heirs males of their bodies, remainder to the said daughter, &c. And in the indenture there was a *power* of revocation of those uses, and also a power to declare new uses. An indenture was made accordingly revoking the first uses, in which there was also a power

Ward v.
Lenthall,
1 Sid. 343.

power of revocation, but no power to limit new uses. Then a third indenture of revocation, and also declaring new uses was made; which indenture contained a clause, that all other fines afterwards to be levied should enure to those uses. Upon this case it was argued, and also agreed by the court, that, if an indenture declared the uses of a fine, and further that it should be lawful to revoke, &c., and to limit new uses, &c., the party might, by such deed, revoke and *limit* new uses as often as he pleased, and all the estates should arise out of the fine. But, if upon any such indenture, wherein he declared new uses and reserved power of revocation, he omitted *expressly* to reserve a power to limit new uses; he could then only revoke, and could not limit new uses *by virtue of the estate raised by the first fine*. And thereupon the counsel, in support of the last indenture, shewed another fine levied the term after the date thereof, by which it was agreed, that the estates limited by the last indenture were well raised.

Anonymous,
Strange 584.

Again, where *A.* suffered a recovery to the use of himself for life, remainder to *B.* in tail, remainder to *C.* in tail, remainder to *D.* in tail, remainder to *A.* in fee, with power to revoke the three remainder

remainders in tail by any writing under his hand and seal: he revoked them within the terms of the power, and, by the same deed, *declared* new uses in favor of the plaintiff, *without* any words of conveyance, covenant to stand seised, or consideration expressed. And hereupon the question was, whether this new *declaration* of uses was good or not? It was insisted in support thereof, that A., having revoked the intermediate remainders, had the whole fee in himself, and might dispose of it as he pleased: and whether it was by the same deed or by a different deed was not material. But it was answered, and resolved by the court, that true it was he might, by will or any new conveyance, have made such new disposition, and even the said deed would have been sufficient for that purpose, if there had been a *new grant*, or a *new covenant* on *consideration* expressed; but here he had declared new uses as under the recovery, whereas the uses of the recovery were full before, and the power was only to revoke and not to declare new uses.

And, in instruments for raising, and creating, or direction of uses and powers, as well as in all other modes of assurance, one general rule is to be observed, namely, *an adherence, in the construction of them, to the intention*

Co. Lit. 49,
a.

Vid. 3
Brown's
Parl. Ca. 552.
3, 4, 5, 6.

Supra 266.

intention of the parties concerned therein, so far as it stands with the rules of law.

Thus, in the case of *Fitzgerald* and Lord *Fauconberge*, it was contended, that the lease and release of *September, 1715*, being executed in the presence of two witnesses only, ought not to be construed a revocation of the settlement of, *1712*. For the clause in which the power of revocation was reserved, was one entire sentence, and the circumstances, with which *F.* thought fit to have his revocation of so solemn a settlement attended, were applicable to every method of executing that power; it was unreasonable *therefore* to imagine, he intended that, an express revocation should not be good, unless those circumstances were observed, but that an implied revocation should take place, though unattended by any of them. That, the construction contended for by the heirs at law, supposed the first part of the proviso (to grant, sell, or demise any part of the premises) to be a distinct sentence, and a different branch of the power unconfined to the ceremony of execution in the presence of three witnesses, and to enable *F.* by a grant, which required neither signing or attestation, but only sealing and delivery, to revoke the whole settlement: but, those words,

words, if taken as a distinct sentence, were incompleat, and the construction put upon them was neither consistent with the intention of the proviso itself, or with several other clauses in the deed. For, it would render the greatest part of the power, which followed these words, nugatory and useless; because there was scarce any thing which, by the subsequent part of the clause, he was impowered to do under the restrictions therein limited, but what he might, *in effect*, do by these previous words, without any restriction at all. Besides, the clause for raising such sums out of the estate, as *F.*, by will or deed executed in the presence of two witnesses, should appoint, and the power of leasing by deed or writing under hand and seal executed in the presence of two witnesses, had, *in vain*, directed those ceremonies to be observed in the execution thereof, if, by the construction of the other side, *F.* might do both without observing either of those ceremonies: and it was impossible to conceive that by the words, “grant, sell, or demise,” he intended to reserve a general power of demising the premises, for the *longest term of years*, without any signing or attestation of such lease; when, by the clause inserted for that particular purpose, he had expressly confined his power of leasing, *even*
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for one year, to the ceremony of signing such lease in the presence of two witnesses. On the contrary it seemed to be *F.*'s intent, not only to reserve a power of revocation, but also to confine the execution of it to particular ceremonies, in order to ascertain what act of his should, or should not, be deemed a revocation of the settlement, which he had so deliberately made; and the ceremony of attestation by three witnesses, being, with propriety, applicable to the whole proviso, and consistent with all the other parts of the deed, it seemed to be a natural construction, that it should extend to the whole clause. But, it was contended on the other side, and so held by the court, that it appeared from the whole tenor of the settlement of 1712, that *F.* intended to retain an absolute power, notwithstanding that settlement, to dispose of the whole estate at his will and pleasure by such conveyances as he should think fit, without confining himself to do it in the presence of any number of witnesses, or with any particular circumstances. This intention was shewn by the introductory part of the deed being interwoven with the consideration, and, pursuant thereto, he took care to have the third proviso inserted in the body of the deed; by which it was made lawful for *F.*, " at any time during his life,

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at his will and pleasure to grant, sell, or demise the premises, or any part thereof:" and the same proviso concluded with these general words, "that the said *F.* should and might dispose of the premises, and every part and parcel thereof, to such person and persons, use and uses, as he should think fit, any thing before mentioned to the contrary notwithstanding." That this last sentence was independant of the preceding branches, and the different powers reserved to *F.* by this deed were neither repugnant or useless; for, as some things, therein contained, were of such a nature as might make him desirous to keep it *secret*; so it was plain he intended to have it in his power to defeat that settlement, by conveying the estate to uses, different from the uses thereby limited, *without being under the necessity* of referring to or taking any notice of it. And this construction was the more reasonable, inasmuch as powers, reserved to the owner of the estate, had always been liberally expounded so as to answer his intention, as being part of his ancient right and dominion over the estate.

A power of appointment includes in itself a right to appoint either absolutely, or *with a power of revocation*, although no ex-
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ptess power of revocation be reserved in the deed creating the power of appointment.

Adams v.
Adams,
Cowper 651.

Thus, where *P.* and *C.* his wife, and *S.* and *F.* his wife, (*C.* and *F.* being seised of the estates in question in fee as coparceners,) executed an indenture, dated *November 3d, 1758*, wherein *P.* and *S.* covenanted with trustees therein named that they and their wives should levy three or more fines (which fines were accordingly levied) of all the said estates to the following uses, *viz.* as to one undivided moiety to the use of such person or persons, for such estate or estates, and to such uses, as the said *P.* and *C.* his wife should by any deed or writing jointly limit or appoint, and, in default of appointment, to particular uses therein mentioned. And as to the other half-part, to the use of such person or persons, for such estate or estates, as the said *S.* and *F.* his wife, by any deed or writing to be by them jointly executed in the presence of two witnesses, should from time to time direct and appoint; and, for want of such direction and appointment to the use of the said *S.* for life, remainder to *F.* for life, remainder to trustees and their heirs for life of the survivor of *S.* and *F.* his wife in *trust* to preserve contingent remainders, remainder to the use of such child

child or children, by the said S. on the body of the said F. begotten or to be begotten, and for such estate or estates as they should jointly, *or as the survivor, in case of no joint appointment, should, by deed or writing, or as the survivor should by will, attested by three witnesses,* limit, direct, or appoint; and for want of such direction, or appointment, gift or devise, to the use of the first and every other son of S. and F. his wife severally and successively in tail; remainder to all the daughters of the said S. and F. his wife in tail as tenants in common; remainder to such person or persons *as F., whether covert or sole, by any deed or deeds, should direct, or appoint;* and, in default of such appointment, to the right heirs of the said F.

By deed poll, dated *November 29, 1758,* under the hands and seals of S. and F. his wife, attested by two witnesses, reciting the first mentioned power of appointment in the deed of the *3d November, 1758,* S., and F. his wife, did direct and appoint the said undivided moiety of the said estates and premises to the use of S. for life, remainder to F. his wife for life, remainder to the trustees and their heirs to support contingent remainders, re-

mainder to the use of such child or children of the said *S.* on the body of *F.* begotten or to be begotten, and for such estate or estates as they should jointly by deed or writing attested by two witnesses, or as the survivor, in case of no joint appointment, should by deed attested by two witnesses, or by will attested by three witnesses grant, release, limit, or appoint, give or devise the same: and, in default of such appointment, to all such children, living at the death of the survivor of the said *S.* and *F.* his wife, equally, as tenants in common in tail, with cross remainders amongst them, remainder to the use of the said *S.* and *F.* his wife, and the survivor, and the heirs and assigns of the survivor for ever, *with a power in S. and F. his wife jointly, by deed with two witnesses, to revoke the above uses, and to limit any other uses by deed executed in the presence of two witnesses, and a power in the survivor to join in a partition of the premises, or to sell the said undivided moiety, investing the money in other lands to be settled to the same uses.*

By articles of agreement, dated the 24th of September, 1764, between *P.* and *C.* his wife of the one part, and *S.* and *F.* his wife of the other part, reciting as therein it was

recited,

recited, it was agreed, and the said *P.* and *C.* his wife, and *S.* and *F.* his wife, did, thereby, severally and respectively limit, order, direct, and appoint, that all the premises in *C.* and *W.* should be and remain to and for such and the like uses, intents, and purposes, as were mentioned with respect to them the said *S.* and *F.* his wife concerning their, or the said *F.*'s, undivided moiety of the whole estate by the indenture dated the 3d day of *November*, 1758. And it was also agreed that the other estates should be limited, &c. to the same uses, as were mentioned with respect to *P.* and *C.* his wife concerning their share of the said estates by the said last mentioned deed; and that a proper deed or deeds for dividing and allotting the said estates, agreeable to the intention of the said parties, should be forthwith prepared and executed by the said parties: neither of the deeds of the 3d *Nov.* and 29th *Nov.* 1758, was recited in these articles or mentioned therein otherwise than as aforesaid.

By indenture, dated *October* 20, 1761; and made between all the above-named parties, reciting the indenture of the 3d of *Nov.* 1758, (but not the indenture of the 29th of *Nov.* 1758,) and also reciting the

said division of the premises, *P.* and *C.* in consideration of five shillings paid by *S.* and *F.* his wife, and of five shillings paid by *B.* one of the trustees in the original settlement, by virtue of all powers in the indenture of the 3d of Nov. 1758, and of all other powers, did, by consent, direction, and appointment, of the said *S.* and *F.* his wife, limit, direct, and appoint unto *B.* his heirs and assigns, all the undivided moiety of them the said *P.* and *C.* his wife of and in the premises before-mentioned, to hold unto the said *B.* his heirs and assigns for ever to the uses following; viz. to the use of such person or persons, and for such estate or estates, as the said *S.* and *F.* his wife should, by any deed, or writing, from time to time, release, or appoint, and, in default of such joint appointment, (which was the case) to the use of *S.* for his life, remainder to *F.* his wife for her life, remainder to *B.* and his heirs to preserve contingent remainders, remainder to the use of such child or children of the said *S.*, begotten or to be begotten on the body of the said *F.* his wife, and for such estate and estates as they, by deed or writing under both their hands and seals, or as the survivor of them, in case of no joint appointment, by deed or writing under the hand and seal of such survivor attested by

by two witnesses, or as such survivor by will should limit and appoint; and if no appointment, then to their first and other sons in tail, remainder to the daughters, as tenants in common in tail with cross remainders, remainder to the use of such persons as the said F. whether covert or sole should appoint, remainder to the right heirs of F. Soon after this S. died, leaving three children and no more by the said F. his wife, namely, F. A. their son and M. A. and C. A. their daughters.

And, by another indenture dated 4th July 1767, between the said F., widow of S., of the first part, B., the trustee, of the second part, and F. A., M. A., and C. A. of the third part, duly executed by the said F. in the presence of, and attested by, two witnesses (reciting the deed of the 23d of Nov. 1758, and the indenture dated 20th October 1764, and also, that, by the said deed poll dated 29th Nov. 1758, the premises there stood limited, &c., and that S. was dead, and that no other appointment had been executed) the said F., in pursuance of the power to her reserved by the several recited indentures and deed poll and of all other powers, did grant, limit, direct, and appoint, the said two several moieties, or half parts of the

said premises, to the use of the said *M. A.* and *C. A.*, her daughters, for five hundred years, to commence from the death of the said *F.*, subject to the proviso after-mentioned, remainder to the use of her son *F. A.*, his heirs and assigns for ever. Proviso that, if the son should pay the daughters 3000*l.* each, or 6000 *l.* to the survivor, the said term should cease, with the following power reserved to the said *F.* to revoke that appointment, namely, "*PROVIDED, lastly, and the said F. doth hereby reserve to herself full power and authority to revoke these presents, and to limit all and singular the premises to, or between, the said children, or any or either of them, in such manner, and for such estate or estates, as she should think fit.*"

Afterwards *F.*, by deed, dated 25th Oct. 1771, executed pursuant to the power reserved in the last mentioned indenture, and reciting the deeds of the 3d Nov. 1758, 20th Oct. 1764, the deed poll of 29th Nov. 1758, and the indenture of 4th July 1767. and the proviso in the last deed to revoke, in pursuance of the power reserved to her thereby, and of all other authorities, did grant and appoint the premises, subject to her own estate for life and the proviso after-mentioned, as to one moiety, to the use of *M. A.*
her

her eldest daughter for life, remainder to the trustees and their heirs to preserve remainders, remainder to the first and other sons of the said *M. A.* in tail male, remainder to the daughters of the said *M. A.* in tail general, as tenants in common with cross remainders, remainder to *C. A.* the youngest daughter for life, remainder to trustees to preserve contingent remainders, remainder to her sons and daughters in the same manner, remainder to the use of the right heirs of the said *F.* for ever. And, as to the other moiety, to the said *C. A.* for life, with remainders in the same manner as in the first limited moiety. In this deed also power was reserved to *F.*, the mother, to revoke and appoint anew.

- In *January* 1775, *F.* died intestate, leaving her three children surviving her.

And one question, upon the operation of these several instruments, was, whether, there being *no power of revocation* reserved in the deeds of the 3d *Nov.* 1758, creating the power of appointment, nor in the deed dated the 20th *Oct.* 1764, enabling the survivor of the husband and wife to make an appointment of the estate in question, the widow, by the deed of appointment 4th *July*

1767, and S. and F. his wife, by the deed of 29th Nov. 1758, fully executed the powers contained in the deeds of the 3d Nov. 1758, and the 20th of Oct. 1764. And it was held they had not; for, the deed of 29th Nov. 1758, was revoked by the subsequent instruments of the 24th Sept. and the 20th of Oct. 1764; and the appointment made by F. the widow, who survived her husband, dated the 4th July 1767, was revoked by the deed of the 25th of Oct. 1771. The validity of which *latter* revocation depended upon *her* right to appoint with *power* of revocation.

Lord Mor-
dant v. Earl
of Peter-
borough.
3 Keb. 305.

If a power of revocation be reserved to be executed conditionally, *ex. gra.*, with the consent of a third person, that *fact* must be clearly proved; and, therefore, where, on an issue out of Chancery, the plaintiff claimed by a deed of lease and release made by the Earl of *Peterborough*, and sealed by the Earl and his Countess, wherein there was a power of revocation, and which deed there was *reason to make her party to* to save her jointure; this lease and release was urged to have been a revocation of a former settlement, wherein there was a proviso that the said Earl might, *by the consent of the Countess*, obtain in writing a revocation in the pre-
sence

sence of three witnesses. But it was doubted that her *bare sealing* the latter deed was no sufficient assent to make a revocation, unless the latter conveyance had been said to have been *by assent* of her, or there had been a mention of her assent in any clause thereof, which there was not; and the court, being of that opinion, directed the facts to be found specially, and also that there was no other consent.

But it seems that the Countess's sealing the deed would, in the preceding case, have been good presumptive evidence, upon which the jury might have found an assent by her to the revocation, *if her signature could have been accounted for upon no other ground.* Sed quære.

In *Englefield's* case, a question arose, whether a power of revocation was forfeited to the crown by attainder, and whether the crown could perform the condition? and a distinction was there taken between powers that were *personal and individual*, and could not be performed by any other than the person in whose favor they were created, and those which were *not so inseparably annexed* to the person, but that they might be performed by any other.

7 Rep. 11. b.
S. C.
Moore 303.

Powers

Powers of the former kind are such, as require the revocation to be executed *by an act or acts, which can only be performed by the person to whom the execution of the power is delegated.*

Cited 7.
Rep. 13.

Thus where *Thomas, Duke of Norfolk*, conveyed lands to the use of himself for life, and, afterwards, to the use of his eldest son in tail, with divers remainders over; with proviso, that, if he should be minded to alter and revoke the said uses, and should signify his mind by writing under *his proper hand and seal*, subscribed by three credible witnesses, that *then, &c.* Afterwards the Duke was *attainted* of high treason, and, upon the question, whether this condition was forfeited to, and could be performed by, the crown? it was held, that it was not given to the crown by the act of 33 *Hen. 8. c. 20*, because the performance of it was personal and inseparably annexed to the duke's person: *viz.* to signify his mind *by writing under his own proper hand*, which none could do but the duke himself. Upon which point, all the possessions of the dukedom *so conveyed* were saved, and not forfeited by the attainder.

So, where one, possessed of a long term, assigned it in trust for himself for life, with
 2 power

power for him to make leases, and, after his death, in trust to levy several sums of money for several of his kindred, the remainder in trust for one of his sisters. Provided that, if he left issue, or had a wife enſient, he might diſpoſe of it to his iſſue and another; proviſo, that if he ſhould be minded to diſpoſe of it *otherwiſe*, and declared his mind ſo to be by writing under *his hand* and ſeal, that he might ſo do. He was attainted of treaſon; and the queſtion was, whether the term was forfeited to the crown? and it was adjudged in *Com. Ban.* that it was not forfeited: which judgment was afterwards affirmed on writ of error.

Smith v.
Wheeler.
1 Lev. 279.
S. C. 1 Vent.
128.
Mod. Rep.
16. 38.

Powers *not* inſeparably annexed to the perſon, and which may be performed by others, are, where the thing to be done is *merely* collateral or formal, and does not depend upon any *election* or *act* of the *mind* of the donee of the power.

Thus where Sir *Francis Englefield* by indenture, between him and his nephew, covenanted for the advancement of his blood, &c. to ſtand ſeized to the uſe of himſelf for life, and, afterwards, to the uſe of his ſaid nephew and the heirs of his body, and then to the uſe of the right heirs of his nephew.

And

Englefield's
caſe,
7 Co. 11. b.
S. C. Moore
303.

And it was further contained in the same indenture, that, because his nephew was an infant, so that his *proof* was not then seen, and because the uncle did not think convenient to settle the said inheritance in the nephew absolutely, so long as the uncle should live, without a bridle to restrain him if after he should be prodigal, or should be given to intolerable vices : for this cause it was provided, that, if the uncle by himself, *or by any other*, during his natural life, delivered or offered to the nephew a gold ring, to the intent to make void the uses, that *then* all the uses should be void. Sir *Francis*, the uncle, was afterwards indicted for treason committed at *Nemuris*, in *Hammonia*, in *partibus transmarinis*, and thereupon outlawed ; and, afterwards, at a parliament 29 Oct. 28 *Eliz.* the attainder was confirmed. And it was objected that this condition should not be given to the queen by the statute, 32 *Hen.* 8. c. 20. for three reasons. First, this condition was annexed to Sir *Francis's* person with such inseparable privacy, that it could not be given to another ; for, in this case, the substance of this condition was the *intent* and *mind* of Sir *Francis* ; but, because his intent and mind could not appear without an act, for this cause the ring should be tendered as a declaration of his intent,

intent, which was inward and secret to himself, so that the tender of the ring was only the outward ceremony, but, the substance of the condition was the mind and will of Sir *Francis*, which could not be transferred to another. Also, in this case, nature was made judge, for the uncle was to judge of the quality and disposition of the nephew, and whether he gave his uncle cause to revoke or disannul his estate; and, therefore, as natural love or affection could not be transferred to another, so this conveyance, of which natural love and affection was the cause of the creation of it, and the judge of the determination of it, could not be revoked or determined by any other. Secondly, by the general words of the act of the 32d *Hen. 8.* conditions separable and which might be performed by others, and not conditions *inseparable*, were given to the king. Thirdly, it was objected, that, this being a collateral condition, although the condition were given to the queen, *scilicet*, the benefit of it, if it had been performed, yet the performance of it was not given to the queen by the said act, and, therefore, Sir *Francis* ought to render the ring and not the queen. But, as to the first and second objections, *Manbood*, Chief Baron, and the whole court held, that the whole force and effect

effect of the condition, in the case at bar, did consist on the tender of the ring, and that the other matter of the reason and cause, which moved and induced him to leave the said power and bridle in himself, was *not* any parcel of the proviso, but a flourish (as he termed it) and preamble; and nothing was parcel of the condition, but that which came *after* the proviso, and that was the tender of the ring; for, although the nephew were not given to vice, yet the uncle, for payment of debts or other consideration, might have revoked the uses by the tender, and, as to that, it was not annexed to the person of Sir *Francis*, but *any other* might do it as well as himself. The same law of payment of money, delivery of gold spurs, and the like. As to the third objection, it was resolved that, when the statute gave the condition to the queen, the performance thereof (which was not personal or inseparable) was also given to the queen, as incident to it; for, the performance was the substance and effect of the condition, and the statute put the queen in the place of the person attainted, to do that for the performance of the condition which was feasible, and which was not inseparably annexed to the person of him who was attainted.

But

But, if a power to revoke be upon a collateral act done, as tender of a ring or the like, and the revoker be *also* restrained to do some *special corporal act*, so that the condition is *restrained to the mind or the hand* of the revoker, in such case none can perform the condition, *but the person himself* in whose behalf it is reserved.

Per Man-wood, in Englefield's case, Moore 336.

Thus, where Sir *William Shelle*y, seised in fee of the manor of, &c., made a conveyance to trustees in fee to the use of himself for life, remainder to his eldest issue male in tail, remainder over: provided that, if Sir *William Shelle*y, at any time during his life, gave or delivered, or lawfully tendered, to the feoffees, or to the heirs or assigns of the feoffees, or any of them, or to any one of them, a ring of gold, or a pair of gloves of the value of 12 *d.* or above, or the sum of 12 *d.* or above, *be the said William Shelle*y then declaring and expressing, that the tender was with intention to make void the said feoffment, that then the said feoffment should be void, and, from thenceforth, the feoffees their heirs and assigns, &c. should be seized to the use of *William Shelle*y and his heirs. Afterwards Sir *William Shelle*y was attainted of treason, and an act of parliament passed, forfeiting all his lands to the queen.

Hardwin v. Warner, Palmer 429.
S. C. Latch 107, et
2 Roll. Rep. 393.
Jo. 134.
Noy 79.

Then

Then the queen commissioned Sir *John Fortescue* to tender the ring &c. according to the proviso, which he did. And one question was, whether the power of revocation was well performed by the tender made by Sir *John Fortescue* by command of the queen? And it was, after very elaborate arguments, held by *Dodderidge*, *Randall*, and *Crew*, Chief J. against the opinions of *Whitlock* and *Jones* that it was not well executed. *Whitlock* and *Jones* argued that, clearly, if there had been nothing more than a tender of the ring required, the condition had been forfeit. Then, there was nothing more, for the words *ipso declarante* were no more than the law implied; as, if *ipso declarante* had not been inserted, yet, there ought to have been a declaration, and then *expressio eorum quæ tacite insunt nihil operatur*. And *Dodderidge* and *Crew* agreed in all the reasons and grounds that had been stated by *Whitlock* and *Jones*, and that the difference between them was not *in the reasons*, but *in the case*; for, *Dodderidge* agreed that, if the act there were *not* personal, it should be forfeited to the king; he also agreed, that, on *every* tender, there *must* be a declaration, as had been urged on the other side; but he said that was a *general* declaration, and *without* such tender of the ring nothing operated. But, in the principal

principal case, it was a *special* declaration annexed in *another* manner than the law annexed it, and, for that reason, it became *personal* to *William Shelley*, and was not forfeited. In *Englefield's* case, *Englefield* allowed, that *any other* might tender for him : for, *there* it was, " if he, or *any other for him.*" But, in this case, it was, " *IPSO declarante,*" which was *personal*, because *IPSE*, *ILLE IPSE*, were *personal* : and here were too parts of the condition, *a tender*, &c., and *a declaration*, and, by the form of the deed, it was expressly to be performed by *William Shelley* himself, and both parts were to be performed at the same time, and both ought to be done by *Sir William Shelley*.

Upon the two preceding cases it is material to observe, that the ground of distinction between such powers as are forfeitable to the crown, and such as are not so, doth not depend *upon the thing* which is to be done in execution of the power, *an error* that one might fall into *from* the manner in which *Englefield's* case is stated in 7 *Rep.*, for, there, *Manwood* rests his argument on the tender of the ring, and says that the law would be the same of payment of money, delivery of gold spurs, or other the like : but, it depends upon the *express form* in which

Moore 605.
S. C. 1 Rep.
174. 5 Resol.
S. C. supra,
239.
et vide Earl
of Shrewsf-
bury's case,
cited 1 Rep.
174.

the power is reserved to *be executed*. And so it was held by *Jones* in his argument in *Hardwin* and *Warner*; for, *Jones* agreed, if the condition of the power, in that case, had been, “if *William Shelley tendered* IN PERSON,” *that* would not have been forfeit. And so *Manwood* argued in *Englefield’s* case (*vid. Modre 335, b*) for he said, “there was no inseparable privity between the uncle and the nephew, that should hinder the title of the queen to the condition; for, *as to the person* of him who *ought* to make the tender, it was limited to be by the uncle himself, or *by any other*; and *as to the person* to whom the tender *was* to be *made*, that was to the nephew, his executors, or administrators; and *as to the time or place* of the tender, *none* was appointed; for which reason there was not, *in any of those things*, requisite any particular privity or restraint to the person of the uncle or nephew.”

1 Rep. 174.
supra 246.

And it was held in *Digges’s* case, that, if one have power to revoke by deed, or tender, or other ceremony, and he execute the ceremony, the uses or estates cease without claim or entry, if the party who hath the power be tenant of the freehold: First, Because he himself, being tenant for life of the land, cannot enter *upon himself*; and,

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clima

claim he need not, when *he himself* is *seised* of the land, and makes an express act of revocation, which is as strong as any claim can be; Secondly, Because the *conditional* words determine the uses by *limitation*; for, the *sense* of a *limitation* concurs with the *intent* of the party, who has appointed a remainder over, whereas a *condition* is only to *reduce* a thing *back to the donor*. Thirdly, Because one quality of an use is to *cease without* entry or claim.

Moore, 612.
C. Litt. 215.
a, 237, a.

So, in *Englefield's* case, it was held that the queen had *determined* the use *by tender of the ring*, without office found; because, says *Manwood*, Chief Baron, offices are to find titles precedent to the offices, not *those* that are *instant* titles, as alienations, mortmains, and such like before office.

Supra 307.

Moore 337.

If a power be *simply collateral*, the donee of the power cannot, on execution of it, reserve to himself a power of revocation; for, being only a *bare* authority, it must be *strictly* pursued. The law was held to be so in respect to an authority in *Wall v. Thurborne*, where one, having three daughters *only*, by his will, directed that his lands should *descend* and *come amongst* his daughters, in such *shares* and *proportions* as his wife, by

Wall v.
Thurborne,
1 Vern 355.

deed in writing, should direct and appoint; the wife made *an appointment* with power of *revocation*; *et per turiam*, as to the power of revocation, the case might be eased of that, for it was *only* an authority *in the wife*, and that being once executed, she could not reserve such power to herself.

A power of revocation may be executed *pro tanto*. As if a lease be made by an instrument having all the qualities required in the execution of the power, it will enure as an alteration of the first uses, and an *execution* of the power of revocation *pro tanto*; and, therefore, is *consistent* with the power of revocation, without any colour of suspension of the power to alter or revoke for the reversion.

Vid. supra.
Fol. 16, 17.

And if a lease be made by deed poll, or parol, and not according to the directions of such power of revocation, such lease will be good, and *that* likewise will not suspend the power; because a power *annexed* to an inheritance or freehold *cannot be suspended* by the making of a *term*, although it may be extinguished by livery: for, it may be resembled to the case of two jointenants, one makes a lease for years and dies, that shall not impede the survivorship, but a lease for life severs the jointure. So, though the
survivor

33 H. 6, 1.

survivor derive his title from the feoffor, without mentioning his companion, yet he cannot avoid a lease for years of his companion. And if tenant for life make a lease for years, he may surrender the freehold without impeachment of the term. So if lessee for life with condition to have fee, make a lease for years, that does not suspend the power to increase the estate by the condition; and in like manner, in the principal case put, the lease for years will be valid, and for the residue of the estate, the power of revocation will remain.

This is clear from *Englefield's* case, where the queen (having an estate for term of the life of Sir *Francis Englefield* by forfeiture for treason, and power to make void all the uses of a conveyance, by which that estate for life was created), made a lease for forty years to *F.* and, *afterwards*, executed the power: and, on intrusion brought against the lessees, they were, after long argument both at the bar and by the bench, judged intruders after the execution of the power of revocation: for, from this decision two things are manifest; namely, First, That the power of revocation was not suspended by the leases; Secondly, That the queen, by extirpation of the uses, avoided her own lease; and, although the case of the queen

Supra. 299.

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be

be no precedent for the subject in such cases to avoid their own leases, *yet the reason of that case proves, that the power of revocation was in force to every purpose but to avoid their own leases.*

Yellandre v.
Fietis, Moore
788. S. C.
Dy. 290. in
Marg. Et
vid. Bullock
v. Thorne,
Moore 615.
S. P. et S. C.
infra.

So, where one covenanted to stand seised to the use of himself for life with divers remainders over to others, some for life and others in tail, with reversion in fee to himself, with general power of revocation of all uses in remainder: he made a lease for years in remainder, and, *then* revoked during the term. The question was, If he could revoke, or whether he had suspended his power of revocation during the term by his lease? *Coke*, Chief Justice, held, that he might revoke for all but the term; and that, if one made a conveyance with power to make leases, and also with power to revoke, if he made a lease he might revoke for the residue.

But it was doubted, in the preceding case, whether, when the donee had not *power to make leases*, and *yet* had made a lease, that lease should be good, upon which point, the reporter says, the court were divided in opinion: but that point hath since been settled in favor of a lease made in such case, without any express power for that purpose; such

such lease having been held to be good, and not subject to be defeated by execution of the power at a subsequent period.

Thus, where Lord *Bolingbroke*, seised of an estate for life in lands, the remainder being in strict settlement, with a power vested in *his lordship* to revoke those uses, and to limit &c., by indenture, granted the said premises to Mrs. *Hare*, for a term of 99 years determinable upon his lordship's life, subject to a pepper corn rent: which lease was made to secure the payment of an annuity, sold by him to her for a valuable consideration. Then Lord *Bolingbroke*, by virtue of all powers vested in him for that purpose, revoked the old uses, and appointed the estate in question to new uses. And a question arose between Mrs. *Hare* and a purchaser of the estate under the new uses appointed on revocation, whether her lease was affected thereby? which depended upon the question, whether Lord *Bolingbroke* could make such a lease, not subject to be defeated by an execution of his power? and it was argued on behalf of the purchaser, that a tenant for life, who had only a qualified or defeasible interest, could not alien the estate for his own life, discharged from the qualification that affected it in his own hands. That,

Goodright v. Cator, Dougl. Rep. 477 et vid. *Snape v. Turton* *infra*.

therefore, every one, who took an estate under his lordship, must take it, as he held it, subject to the operation and consequences of the power of revocation; but the court were unanimously of opinion, that the lease to Mrs. *Hare* was valid, and not subject to be defeated by the *execution of the power*; for, that Lord *Bolingbroke* had a right to make this lease. It was a right which arose out of the nature of his estate. The question then was, whether *the same* Lord *Bolingbroke* who had made this demise, for a valuable consideration, could be authorized to revoke it under any power in any settlement; for, by the power *the revocation was to be executed by him*. And they were clearly of opinion, that he could not.

2 Roll. Abr.
263. 2.
Ventriz.
supra. 10. 17.
112.

Moore 615.
infra.

The court, in the case of *Snape v. Turton*, said, that, if he, who had such power to revoke and to limit new uses, made a lease for life, *that* would suspend his power as to the fee: But it was *beld* by *all* the judges, in the case of *Bullock v. Thorne*, as a general proposition, that, if one had an entire power of revocation, and extinguished or suspended the power in part, he might revoke for the residue, if it were by way of use; *sed nota*, that was the case of a lease for years only.

And

And if lands, subject to a power of revocation, be vested in the crown, they are immediately divested *without office*, by execution of the power; unless the condition of the revocation be by an act to be performed to the crown.

Thus, where conuzee of a fine made a lease for life, by deed inrolled, to a stranger, with remainder to the queen, upon condition to be void upon tender of money to the tenant for life: the question was, if the tender of money to the stranger, divested the remainder out of the queen? And it was agreed, *per curiam*, that the tender divested it *without office*, because the condition was not performable to the queen, but to the tenant for life.

Hemley v.
Brice, Moore
546.

So, it was resolved in *Snape v. Turton*, that, in that case, the grant of the reversion by deed inrolled was a good revocation, and revoked the uses limited in remainder to the king, *without office or any other act*.

Supra, 278.
W. Jones
393. 3 Resol

A man, that hath a power of revocation, may, by his own act, extinguish his power of revocation in part of that which is subject thereto, as by levying a fine of part, and yet the power will remain for the residue, because

Earl of
Shrewsbury's
case, pasch.
39 Eliz.
Mich, 40, 41
Eliz. cited
Co. Litt,
215. a.

cause it is in the nature of a limitation, and not of a condition.

It is enacted, by the 27 *Eliz. c. 4.* “That
 “ if any person or persons had theretofore,
 “ since the beginning of the queen’s reign that
 “ then was, made or thereafter, should make
 “ any conveyance, gift, grant, demise, charge,
 “ limitation of use, or uses, or assurance of,
 “ in, or out of, any *lands, tenements, or hereditaments*, with any clause, provision, article, or condition, of *revocation, determination, or alteration*, at *his, or their, will or pleasure* of such conveyance, assurance, grants, or out of any part or parcel of them, contained or mentioned in any writing, deed, or indenture of such assurance, conveyance, grant, or gift, and, after such conveyance, grant, gift, demise, charge, limitation of uses, or assurance, so made or had, should or did bargain, sell, demise, grant, convey, or charge the same lands, tenements, or hereditaments, or any part or parcel thereof, to any person or persons, bodies politic and corporate, for *money or other good consideration, paid or given* (the said first conveyance, assurance, gift, grant, demise, charge, or limitation, not by him or them revoked, made void or altered, according to the power and authority reserved

“ served or expressed unto him or them, in
 “ and by the said secret conveyance, assurance,
 “ gift, or grant), that then the said former,
 “ conveyance, assurance, gift, demise, and
 “ grant, as touching the said *lands, tenements,*
 “ and *hereditaments*, so after bargained, sold,
 “ conveyed, demanded, or charged, as against
 “ the said bargainees, vendees, lessees, grantees,
 “ and every of them, their heirs, successors,
 “ executors, administrators, and assigns, and
 “ against all and every person and persons,
 “ which had, should, or might, lawfully
 “ claim any thing, by, from, or under them,
 “ or any of them, should be deemed, taken,
 “ and adjudged to be void, frustrate and of
 “ none effect, by virtue and force of that
 “ act.”

“ Provided that no lawful mortgage made,
 “ or to be made *bona fide*, and without fraud
 “ or covin, upon good consideration, should
 “ be impeached or impaired by force of that
 “ act, but should stand in the like force and
 “ effect as if that act had never been had or
 “ made, &c.”

Upon this clause in the 37 *Eliz.* it has
 been determined, that marriage is a *valuable*
consideration within the meaning of this
 statute.

Thus

Griffin v.
Stanhope,
Cro. Ja. 454.

Thus, where communication of a marriage had been had between G. and S., G., before the affiance, promised to assure unto S. 1000 *l. per ann.* for her jointure, his estate being then worth 12000 *l. per annum.* S., reposing confidence in this promise, married G. before any assurance or covenant in writing whatsoever made: afterwards he, by deed, conveyed lands of great value to some friends of S.'s (then his wife), to the use of S. for the term of 100 years, if she should live so long, to commence after his death; *and there was a proviso to determine at the will of the Baron.* And the question was, whether this was a fraudulent lease, being revokable at pleasure of the maker? And the court held, that this lease, *being made in pursuance* of the first promise, although there was not any mention of any lease to be made, was, nevertheless, grounded upon a *valid* consideration, and not fraudulent.

But a settlement made for *a good consideration*, as for provision for children, will, if made with power of revocation in the seller, be void against a purchaser for a *valuable* consideration.

Crofs v.
Faulstenditch,
Cro. Ja. 180.

Thus where E., seised in fee of certain estates in question, in 35 *Eliz.* covenanted by indent-
ure

ure (in consideration of love to his eldest son, and for the settling his lands in his name and blood, and according to the estates, provisos, and limitations, therein mentioned), that he would, before Easter, convey his lands to *A.* and others, to the use of himself for life, the remainder to his said son in tail, with remainders over, and that all estates made, should be to the uses, and under the provisos afterwards mentioned; with a *proviso*, that he might make leases for 21 years of any part thereof, and that the conveyances should be to the use of the lessee; *with a proviso also, that E. might revoke all the uses and estates, by any* his writing or will. He also covenanted, that he would stand seised, from and after Easter, of so much of the said lands which should not be sufficiently conveyed, to the said several uses, intents, and purposes: No assurance was made before Easter according to the indenture. *E.* in 40 *Eliz.* by indenture, for 30*l.* paid, demised to *F.* for 21 years. And the question was, whether this lease made by *E.*, (who was but tenant for life by this conveyance with power of revocation), in consideration of money paid, should be said to be a lease derived out of the estate for life only, or whether the lessee should have benefit of the clause of the 27 *Eliz. c. 4.*

“ That if one make a conveyance with
clause

clause of revocation, and, afterwards, for consideration of money, or for other considerations, bargain, sell, demise, or grant the said land to a stranger, that the said conveyance shall be void and revoked, &c?" And it was held by all the justices, that the lease should be good and absolute, and should not be impeached by the former voluntary conveyance. For, that he who made it having power to revoke it, the law would consider the conveyance as revoked and *void quoad* the lessee, and the lessor as tenant in fee, when he made that lease: and, that the lease, being made *in consideration of a fine paid*, was expressly within the words and intent of the statute of 27 Eliz.

And a lease on which rent is reserved, is also a revocation of such voluntary conveyance.

Hinde v.
Collins, cited
Cro. Ja. 181.

Thus, it was resolved by the court of King's Bench, in *Hinde and Collins*, that, where one made such a conveyance *first*, and *afterwards* made a lease reserving rent, without *other* consideration, *that* was sufficient, and a revocation of the first estate, *quoad* that lease.

And

And, although the power of revocation in such conveyance be limited to be executed at a distant time, yet, if a subsequent conveyance upon *valuable consideration* be made afterwards, but before the power of revocation begins, this case is also within the remedy of the statute; for, although the statute saith, "the said first conveyance not by him revoked, according to the power by him reserved," which seems by the literal sense to be intended of a present power of revocation, because no revocation can be made by virtue of a future power until it comes in esse: yet since, if this case should be construed to be out of the act, it would serve for little or no purpose, as *then* there would be no difficult matter to evade it; it has been held, that the intent of the act was, that such voluntary conveyance, which was originally subject to a power of revocation, whether *in presenti*, or *in futuro*, should not stand against a purchaser *bona fide* for a valuable consideration.

Thus, where a conveyance was made by way of use, with power to *revoke* after a certain day *to come*, and, *before* the day came, he who had the power conveyed to a purchaser; it was held, in the King's Bench in the time of *Wray*, Chief Justice, that
the

Cited per
Walmesly
Justice Moore
618.

the original conveyance was void against the purchaser; and yet, at the time of the purchase, the vendor could not have revoked; the reason of which was that, in the former conveyance, there was power of revocation mentioned, and the conveyance was not revoked according to the power; and the statute is to be intended against fraud and to support purchases.

Ibid.

But in a case, circumstanced as the preceding one, the conveyance would not be void against a purchaser before the time limited for the revocation arrived; but, from that time, all subsequent interest under the original conveyance would be void, because it is subjected to revocation from that time by express agreement.

And, although the power be afterwards extinguished by recovery, feoffment, or fine, or other conveyance to a stranger, to the intent to defraud a purchaser; yet, if the conveyance be originally voluntary, and with power of revocation, such fine, feoffment, or other conveyance will be void, as to the extinguishment of the power, and the original conveyance bad against a subsequent purchaser *for money*.

Thus

Thus, where *B.*, seised in fee or in tail of land, situated in *Erburghfield* and *Barkham* in *Berks*, conveyed it, 28 *Eliz.* by deed of bargain and sale, indented and inrolled in Chancery, to *C.* and his heirs. *C.*, *Hill*, 28 *Eliz.* suffered a common recovery in which he vouched *B.* who vouched the common vouchee, and the use thereof was declared by indentures, to *B.* for life, the remainder to the recoverors for ten years, the remainder to the heirs male of the body of *B.*; and, in this indenture, there was *a proviso of revocation at the will of B., by declaration in writing to be made by him at any time during his life in the presence of six witnesses*, and that, after such declaration, the recoverors should be seised to the use of *B.* and his heirs. Then *B.*, 4 *March*, 28 *Eliz.*, made a lease for years to *H.* determinable upon three lives; and in *Easter* term 28 *Eliz.* he also levied a fine of all the land in *Erburghfield* of which the lease was made, and that was declared to be for further assurance of the term. *B.*, in the 31 *Eliz.*, for 4000 *l.* bargained and sold the land by deed indented and inrolled to *S.* and his heirs, and levied a fine, and also suffered a common recovery with voucher for assurance. *B.* died *Feb.* 36 *Eliz.* and then the recoverors entered, the ten years not being expired, and made a lease; and the question between the lessee

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of

Bullock v.
Thorne,
Moore 615.

of the recoverors and *S.* the purchaser was, whether the former assurance, subject to revocation by *B.* the vender, was not void against *S.* the purchaser by the statute of 27 *Eliz.* And one objection on the part of the lessee was, that this lease of the 4th of *March* 28th *Eliz.* determinable upon three lives, all of which were *then* living, had suspended the power of revocation, and that the fine had wholly extinguished it; and, if so, then *B.* had not in him any power of revoking at the time when he made the sale to *S.*, and they said that the statute of 27 *Eliz.* was to be understood of cases where the feller had power and did not revoke; *there* the statute made the conveyance, (which ought to be revoked,) void, and supplied, *in that*, the office of the party who was to make the revocation, and did not do it. But, when the party could not revoke, then the statute did not make void the conveyance; because the party himself could not make it void: and the words of the statute of the 27th *Eliz.* were serviceable to this construction; for they were to this effect, *viz.* "That, if any one make a conveyance with revocation, and sold the land for money, the first conveyance not being revoked according to the power, the conveyance *in which* there was power of revocation should be void
against

against a purchaser." By which it was to be understood that *the statute* endeavoured to *supply* the *omission* of the party in making that void, which *he* ought to have made void *in justice*, but would not *from craft*; but, when he could not make it void, *there*, no fraud could be intended. But the court held, that the conveyance was void, as well upon the words, as upon the intent of the statute of *Eliz.*: the words were, " When any person made conveyance, &c. with a clause of revocation at pleasure mentioned in the deed, and, afterwards, bargained and sold, &c. the land for money, &c. the said conveyance not being revoked according to the power, &c. there, the first conveyance should be void against the purchaser." Which words squared with the case in question in all three respects. First, here was a conveyance with power of revocation mentioned in the writing. Secondly, this conveyance was not revoked according to the power. Thirdly, he who had made the conveyance had bargained and sold the lands to another for money. And, therefore, according to the letter of the statute, the case *in question* that had all the *circumstances* within the statute, ought also to have the conclusion of the statute; that was, that such conveyance should be void against a

purchaser. The intent of the statute was, that it should be expounded altogether against fraud, and to suppress fraud, and maintain just dealing: it was fraud in *B.* to take 4000 *l.* for the land, and yet that a purchaser should take the land by a former conveyance *voluntarily* made by *B.* for advancement of his name and issues, and which, by express agreement in the writing, ought to have being revoked by *B.* himself; wherefore to support this conveyance would be against the intent of the statute. And it seemed that the extinguishment of the power of revocation, before the sale, did not alter the object and intent of the statute; for, when the power determined, then it was impossible that the conveyance should be revoked according to the power, and, if it could not, then the statute made the conveyance void against the purchaser, for it said, "That, if any one made a conveyance with power of revocation, and afterwards sold the land for money, the conveyance not being revoked according to the power, the conveyance should be void." And to construe the statute that the conveyance should be good against the purchaser, if the power of revocation be determined before the purchase, would be to nourish, not to suppress, fraud; for, then,

the

the seller might make a secret release of the power, or a secret feoffment, of which the purchaser could not have notice; and yet he might shew the purchaser the conveyance in which was a power of revocation, by which he might be encouraged to buy the land, and be deceived out of the land and money both, by such secret release or feoffment, which would be against all reason and equity. And for these reasons the court held *unanimously*, that if a power of revocation be mentioned in a conveyance, whether it be determined or not by any mesne act, yet the conveyance should be void against a purchaser.

And, although property, over which the power of revocation is reserved, be conveyed by several different assurances; yet, as to the operation of this act, all of them shall be considered as but one conveyance.

Thus, it was objected in the preceding case, that the words of the statute of *Eliz.* being, that, “ if *one* make a conveyance of land, with power to revoke at pleasure, and, afterwards, *he* sold the land to another, &c., the conveyance, &c. should be void against the purchaser;” it was expressly meant to extend only to cases where it was

Bullock v.
Thorne,
supra 321.

the same person who made the conveyance with power of revocation first, and the sale afterwards; that *B.*, in that case, was not the person who made both: for, that the conveyance with revocation was created by the recovery *anno 28 Eliz.*, and the indenture declaring the uses thereof, in which *C.*, being the tenant who parted with the land, must be supposed to be the declarer of the uses, and so the conveyance moved from him and not from *B.*; and therefore *S.*, who made his purchase of *B.*, was not relievable by the statute of *27 Eliz.* against the former conveyance. But this objection was over-ruled by all the justices, because the statute of *27 Eliz.* had such words, “ that, if any *one* person made conveyance or *assurance* with revocation, &c.” which word *assurance* comprehended *all* the conveyances that concurred to the assurance intended by the parties, though they were of different natures: as, in the principal case, the bargain and sale to *C.*, and the recovery suffered by him, both concurred with the indenture of uses, to make the land assured *in estate*, as it was limited by the indenture; and *C.* received the land to the intent to enable him, as tenant, to suffer the recovery with voucher of *B.* And, therefore, all this assurance should be accounted

counted the assurance of *B.*, and the uses as limited by him, and the power of revocation was appointed to him : and so *B.* was the person who made the assurance with revocation and also the sale.

It is not necessary that a conveyance, to fall within the statute of 27 *Eliz.*, should contain therein an express power of revocation ; for, if there be circumstances reserved therein *in favor* of the settler, which, *in their operation*, are tantamount to such power ; they will be sufficient to bring the assurance within the meaning and intention of this act.

Thus, where *P.* made a settlement in 1653, by fine and deed, and, thereby, conveyed his estates to trustees to pay all debts contracted, or *for which the trustees were bound*, for fifteen years, the remainder to be disposed by *P.* for jointure of the wife, with power to *P.* to make leases. One ground of objection made by a purchaser, and *admitted* by the court on trial in ejectment, was, that the power in *P.*, after present debts paid, to make an intire lease for ninety-nine years, *with rent, or without*, amounted to a power of revocation.

Lavender v.
Blackston,
3 Keb. 526,
pl. 11.

3 Keb. 751.
Pl. 27.

It is said to have been held by Lord Chief Justice *Bramston*, on the 27 *Eliz.*, that, if such power of revocation, in a voluntary settlement, be with a reservation, not to be executed, unless with consent of a stranger, not under any influence of the party to whom the power is reserved, so that the interposition of a third person's assent, is not *merely* put as a shift to place the power in other names besides that of the person making such voluntary conveyance, but such person is *really* meant to be *party* to the revocation, and joined to prevent its being made, unless upon valuable consideration; this would be good, and not a voluntary conveyance within the statute.

Leigh v.
Winter, Sir
W. Jones
411.

I apprehend the case here alluded to is that of Sir *Francis Leigh v. Winter*. There, Sir *Francis Leigh* assured by fine, certain manors and lands to himself for life, remainder to his son in tail, with proviso of revocation if his son married without his consent. And, afterwards, by indenture between himself and *Bridget Winter*, the grandmother of his said son on the part of his mother, reciting the said proviso and the power contained therein, and certain considerations given to the said Sir *Francis*, it was agreed "by and between the parties thereto, and the

the said Sir *Francis Leigh* covenanted, granted, concluded, and agreed to and with the said *Bridget* the grandmother, that the said Sir *Francis Leigh* should not, nor would, revoke, make void, or determine, any of the uses or estates limited or appointed to, or for, the said son, or his heirs, by the indenture aforesaid, nor should nor would have, use, or execute any power of revocation, determination, or making void, or any way concerning the same, without the licence and consent of Lord *Coventry*, (Lord Keeper,) first had in writing; and did also grant and agree, that any revocation or declaration by him to be made touching the revoking, determining, or making void the said uses or estates, or any of them, without such assent, should be void, frustrate, and of none effect." Afterwards the son married without assent of the father. Whereupon the father *alone* revoked the settlement. Upon a suit in Chancery against the said Sir *Francis*, and the said *Bridget Lane* and the son, the question was, whether the revocation was good notwithstanding the second indenture? and Lord Chief Justice *Bramston* and *Jones* were called into the court of *Chancery* to assist. And they declared their opinion, that, by the said second indenture, the power of revocation, which was absolute in the first indenture,

indenture, was restrained, and that the said *Francis Leigh* could not revoke without the consent of the Lord Keeper; for the power was executory, and, by subsequent agreement by indenture, might be defeated and determined.

It is observable, on the preceding case, that the question arose between the son and the father, and was *only*, whether the father, by the subsequent act, had restrained his absolute power. This case *therefore* doth not decide the question, as to a purchaser for a valuable consideration.

I have not met with any case that goes so far as to say, that a mere voluntary conveyance, with power of revocation reserved, but restrained to be executed with the consent of third persons, shall not be within the equity of the statute of 27 *Eliz.* In the following case, *indeed*, that point was considered, but does not seem to have been settled; because all the claimants under the conveyance were purchasers for a valuable consideration.

Buller v.
Waterhouse,
T. Jones 94.
S. C.
3 Keb. 751,
pl. 27.

Sir *John Maynard* and his wife, seised in fee in her right of a rectory, in consideration of the marriage of *John* their son, and 5000 *l.*
portion

portion paid with his intended wife, and for natural affection, covenanted with Sir *John Lawrence* and three others, relations to the lady; to levy a fine (which was accordingly levied) of the said rectory (*inter alia*) to the use of Sir *John* for life, remainder to his wife for life, remainder to trustees for eighty years for payment of portions and security of the trusts in another indenture of the same date, and delivery of the wife's jointure, and on payment thereof, to *be surrendered*, remainder to *John* their son and his heirs: provided, that it should be lawful for Sir *John* or his wife to revoke the uses, with consent of the said four persons, or the survivors or survivor of them, or the executors or administrators of the survivor, under their hand and seal: Sir *John* died, and his wife entered, and sold the said rectory to the defendant for 400 *l.* paid, and 1000 *l.* more, secured by a mortgage of the said rectory. But the sale and conveyance *were without the consent of the said Lawrence*, the only survivor of the said four persons, all of whom being relations were named trustees for the preservation of the estate of the son and his wife, and on their part. And the question was, whether this sale by the wife was good? And *Levinz* argued, on behalf of the purchaser under the wife, that this depended upon,

This point does not appear in Moore; it is there stated that the power was to be executed in the presence of six witnesses.

upon, whether the deed of settlement made by Sir *John Maynard*, was within the statute 27 *Elizabeth*? and he contended that it was; for that this statute should be liberally taken, as all statutes made to avoid fraud were. And he relied upon the case of *Standen v. Bullocke*, as cited in *Twyne's* case; for, he said that *there* the power of revocation was with consent of J. S., and it was not found that it was a stranger, or person over whom the feoffor had power; and yet the conveyance was adjudged fraudulent as against a purchaser. But it was contended by *Pollexfen*, and so resolved by the court, that this conveyance was not fraudulent within the said statute, as it could not be thought to be made to deceive purchasers; for, it was found that he had *notice*, and that it was made upon great consideration, extending to the rectory. Then the words in the clause of the said statute “at their will and pleasure” were observed, and interpreted, *at their choice, liberty, and election without restraint of any one*; but here it was restrained to the will and pleasure of others; and, although it was agreed that a liberal construction ought to be made to suppress fraud, yet it was said that care ought to be used, that the construction should support conveyances made upon good consideration.

sideration. And, as to the case of *Standen* and *Bullocke*, the restraint, confining the power there, seemed to be lodged in a person devoted to the will of the maker, and *merely* appointed by him; but, in the principal case, the consideration was great, and the right to consent placed in persons entrusted for the wife; therefore this conveyance was in no manner subject to the will and pleasure of the maker thereof, as the statute described.

And in the preceding case, it was objected, that the *conveyance* was *on consideration* but as to the wife's interest in the lands settled *during the term*, not *after*; because the wife's estate was taken out of the term, and then, after that term, it was but a voluntary conveyance; but it was held that the consideration could not be divided, and, though the deed were *as well* for marriage and affection, *as* for money in portion, yet, this was a deed for value in the son, as well as in the wife, whose portion it was.

The distinction, between the cases where powers of revocation restrained to be exercised with the consent of a third person are, or are not, within the meaning of the 37 *Eliz.*, seems to be this. If the interposition
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of a third person in the execution of such a power be *merely* colorable, and to evade the statute, (which is a fact to be positively proved, or a conclusion from circumstances that *necessarily* import as much,) the statute will operate notwithstanding.

3 Rep. 82, b.

3 Keb. 526.

11.

Supra 327.

Therefore, if *A.* reserve to himself a power of revocation, with the assent of *B.*; and, afterwards, *A.* bargain and sell the land to another, the bargain and sale is good, and within the remedy of the statute; for, otherwise, says Lord *Coke*, the good provision of the act, by a small addition and evil invention, would be defeated. So it was held in the case of *Lavender v. Blackston* before-mentioned, that, although the lease (which there operated as a power of revocation) was restrained to be by the assent of a third person; yet, that person not being a creditor, but a relation, and father-in-law, the interposition of his assent did not prevent the lease from being fraudulent.

But, if the intervention of third persons, in the execution of a power, be to preserve or protect rights of others, as of a wife or children, and not *merely* to evade the words of the statute; in such case, the general doctrine laid down in the precedents seems to warrant
a con-

a conclusion, that the power of revocation, *though reserved to the owner*, is considered as *being qualified* and out of the equity of the statute; because, although the revocation be reserved to him, yet it is so clogged, that he can make no use of it without the assent of others, who have an interest in resisting such revocation, unless upon sufficient consideration.

A conveyance, with power of revocation *on payment of a small sum by the revoker*, will, it seems, be void against a purchaser for a valuable consideration. Thus, it was said by the court in *Griffin v. Stanbope*, that, if a lease be made, with a proviso, that, if the lessor pay 10 s., then the lease shall be void, such lease would be void under the statute as to a purchaser; because it was apparent that the *sum to be paid* was not of the value of the land, but *only* limited as a power of revocation. Supra 316.

A power to charge an estate settled, with a particular sum by way of mortgage, or otherwise, has been held not to be within the words of this statute.

Thus, where a power was given to the owner of an estate, settled on himself for life, remainder upon his son in tail special, to charge all and singular the estate in ques-
tion

Jenkins v. Keymis,
1 Lev. 150, 1
S. C. Hard.
395. b.
Supra 26, 27.
126, 129.

tion with the payment of 2000 *l.*, it was objected, that this settlement, being with a proviso to charge the lands with the payment of 2000 *l.*, was void against a purchaser for valuable consideration within the provision of stat. 27 *Eliz. c. 4.* "that made conveyances, with power to revoke, alter, or determine, at *the will and pleasure* of the owner, void." But, upon this point, the court held, that such proviso to charge the estate with 2000 *l.*, was not a power within the words of the statute, "to *revoke, determine, or alter the estate,*" being to charge a particular sum; and, no express fraud being found, the conveyance could not be adjudged fraudulent.

3 Co. 82.
Twyné's
case, Cro.
Eliz. 445.
2 Roll. Rep.
305, 306.

None can take advantage of this clause in the statute of the 37 *Eliz.*, against conveyances with power of revocation, except he who is a purchaser for money or other *valuable* consideration; for, the benefit of the clause is expressly restrained to those who purchase for money, or other *good consideration, paid, or given*, which word *paid* is to be referred to *money* and *given* is to be referred to *good consideration*; so that the sense is for money paid, or other good consideration *given*, which words exclude *all considerations of nature or blood*, or the like; and are to be intended only of valuable con-
siderations

considerations which may be given ; and therefore he who makes a purchase of land for a valuable consideration, is *only* a purchaser within the statute.

Therefore, where one made a lease for 80 years without consideration, and, afterwards, conveyed the land to his wife for a jointure *after marriage* : it was resolved by the two chief justices, and three other justices, that, because this last conveyance was voluntary *without valuable consideration*, the wife could not avoid the former lease, by *avering* that it was *fraudulent*.

Cited per
Beaumont,
Justice,
Cro. Eliz.
445.

And one, who claims relief under this statute, must not only be a purchaser for a valuable consideration, but also must *himself* be free from all imputation of fraud or deceit : for, *per Anderson*, chief justice of the Common Pleas, where a man who was of small understanding, and not able to govern the lands which descended to him, and was given to riot and disorder, by mediation of his friends, openly conveyed his lands to them, on trust and in confidence that he should take the profits for his maintenance, and that he should not have power to waste and consume the same ; and *afterwards*, he, *being seduced by deceitful and covetous persons*,

Cro. Eliz.
445.

Z

bargained

bargained and sold his land, being of a great value, for a small sum of money : this bargain, although it was for money, was holden to be out of this statute ; for, this act was made against all fraud and deceit, and doth not help any purchaser, who doth not come to the land for a good consideration lawfully, and without fraud or deceit. And such conveyance, made on trust, or with power of revocation, is void only as to him who purchases the land for a valuable consideration *bona fide* without *deceit or cunning*.

And, it is observable upon the two preceding cases put by *Beaumont* and *Anderson*, that the reasoning of them applies equally to the clause in the statute respecting conveyances with power of revocation, as to that respecting fraudulent conveyances ; for, the construction of the statute, as to this point, must be the same as to all the clauses of it ; and *Owen* said in *Upton v. Bassett*, 3 *Cro.* 445, that he was at the making of this statute, and that special care was taken, that there should not be any words which should extend to purchasers, unless it were such as *paid money*, or *other good consideration* for their purchase.

And,

And, notice of such conveyance with power of revocation, will not prevent a purchaser for valuable consideration from setting the same aside under the statute; for, the notice of a purchaser cannot make that good, which the act of parliament hath made void as to him; and, though it be true, *qui scit se decipi, non decipitur*; yet, in this case, the purchaser is not deceived, for the conveyance with power of revocation whereof he hath notice, is void as to him by the said act, and therefore shall not hurt him, nor is he, as to that, in any manner deceived.

Vid. Gooch's case, 5 Rep. 60, b.

Sixthly and lastly, With respect to such general observations upon powers as do not immediately fall under any of the foregoing heads.

Powers differ from conditions at common law, in as much as the former may be apportioned, which the latter cannot.

Thus Lord *Hales* observed, in the case of *Edwards v. Slater*, wherein he held the bargain and sale void, as to destroying so much of the power in that case as took effect as a power in gross, and valid as to so much thereof as took effect as a power appendant;

Supra, 11.
13. 27. 28.

that it might be objected, if the fee-simple were discharged, then that the mean estates were so too : as in case of a feignory or condition. But his lordship said, that a power was apportionable, but a feignory or condition was not, as a warranty, though it were destroyed as to the fee-simple, yet it continued annexed to the mesne estates. Thus, where a lease for 100 hundred years having been made and the reversion afterwards granted for life, the lessee for years granted the estate to him in the reversion in fee ; it was held, that a lease for years was not destroyed by meeting with a fee ; because, by possibility, the lease for life might outlast the term : so in the case of *Edwards v. Slater*, there was a possibility that the remainder in tail might last as long as the reversion in fee, and therefore, there was a possibility that the reversion in fee might come in possession; yet the power was not destroyed by it. So, if a grantee in fee of a rent, purchased a remainder in fee of the land, depending upon an estate tail, the rent was not thereby extinct ; because there was but a possibility of the remainder in fee coming into possession. Neither should, in the principal case, the possibility of the remainder in fee coming into possession destroy the power.

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We have already seen in a foregoing part of this treatise, that powers of revocation may be executed at different times, over different parts of the estate upon which they attach ; and the law is the same as to powers of appointment. They may also be executed at *different* times, over *different* parts of the premises subjected thereto.

Thus, where *A.*, in 1707, devised lands to trustees, and declared the trust in strict settlement to his sons, *B.* and *C.* successively ; with power for the persons in possession, from *time to time*, by deed or deeds, to limit and appoint to, and for, any wife or wives, an estate for life of all, or any part of the said lands, which, altogether, were of the annual value of 190*l.* In 1712, *A.* married, and by settlement appointed 98*l. per annum*, to trustees and their heirs, in trust for *E.* his then wife, for, and in name, and in lieu of her jointure, with proviso, that if *E.* should not, within three months after widowhood, release her dower, the settlement should be void ; and a covenant, that the children and all persons entitled, should quietly enjoy according to the limitations of the devise. In 1738, *A.*, by another deed, released this condition of giving up her dower, and in 1751, he, by another deed, reciting the former, and

Woolston v.
Woolston,
Blackston,
Rep. 281.
S. C. 2 Burr.
1136.

that he had since received 600*l.* additional fortune, appointed, in the same form, all the rest of the land in trust for her during her life from and after his decease for increase of her jointure. *A.* died sans issue male, and the remainder came to *D.*; son of *C.*, who brought this action of ejectment. One question was, whether this additional jointure in 1751, was a good execution of the power? It was contended, on the part of the plaintiff, that the power was completely executed in 1712; for, the intent was to enable *James* to make a jointure *from time to time*, on his wife or wives as often as he should marry. And he had completely *exhausted it* with respect to this wife by the *first* deed; which had no express reservation, nor intended any. *Sed, per curiam*, in the *natural* construction of this power, there was *nothing* to bound it, but the will and discretion of the husband. Being a *trust estate*, there was *no* occasion to express, that any settlement by virtue of this power, should be *in bar* of the woman's dower. The devise was drawn, as if intended that the power should be executed at different times; "*by deed or deeds, from time to time.*" It had been said, that this was made to take in the case of *subsequent* marriages. The words, "*wife or wives,*" would *alone* have been sufficient to answer that.

that. For, common sense would shew, that one wife must be dead, before there could be any new appointment to another. The *former* words were therefore nugatory, unless *thus* interpreted. The *intention then was clear* ; namely, that it was *originally* intended to be executed at *different* times, *even upon the same* woman. Then the question was, whether it might be *so* executed within the rules of law? *Digges's* case, was in point, that a person who had *such a power* of revocation, might revoke part at one time and part at another, but *not the same part twice* unless he reserved a new power of revocation.

The power, in the present case, related to *all and every* part of the estate, by the express terms of the proviso. It could not, therefore, be necessary to be all done *uno flatu* ; but might be executed at *different* times : and it was highly reasonable, that it should be so. There might be many cogent reasons to render it convenient : as children, being more or less numerous ; a wife's additional fortune ; or her good behaviour and merit ; or many other circumstances of a family. And what was such a power, but *a mode* of conveyance, putting the *tenant for life* into the *same* condition as if he was tenant

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In fee, *quoad hoc*? therefore the court held, that *it* might be executed at *different* times.

1 Vern. 83. So it was said, by the court in *Bovey v. Smith*, that where a man has a power of appointing a fee, he may execute it at *several* times, and appoint an estate for life at one time, and the fee at another time.

Vid. *Ingram v. Ingram*,
et *Peters v. Marsham*,
infra.

In questions upon the execution of powers, courts of equity will, if the power be *exceeded*, *correct* the excess, and *uphold* the execution thereof, *so far as the power warrants*.

Excesses in the execution of powers, may arise either in respect to the *thing* subjected to the power, or to the *extent* of the *estate* to be created by the power, or to the *quality* and *property* of such estate, or to the *persons* in whose favor the power is to be executed.

Cited 2 Vez.
645.

First, In respect of the subject on which the power is to operate. As, if it be executed to the extent of that and further: Thus, where Lord *Conway*, who had power by one *intire* instrument to grant leases of his estates, granted several leases of estates, some of which were of premises *not within his power*. They were considered as *several* leases,

leases, though all were contained in the same instrument ; and the master was referred to, to separate them.

So, if the subject upon which the power is to operate, consist of things of distinct natures, and the power require to be executed by *different* modes of conveyance ; though the power be executed in *one* mode for all, the execution will nevertheless be valid for *that part* of the subject as to which the mode of execution pursued is *proper*.

Thus, it was held, in *Duff v. Dalzell*, where the power extended over both real and personal estate, and was executed by a will to which there were only two witnesses, that this was *sufficient* to pass the personal estate, it being a *good* execution of the power, as to *that*.

Duff v. Dalzell, *supra*, 83.

Secondly, In respect of the *nature* of the estate or interest to be created by the power. As, if an estate be raised more durable in point of time than the power is limited to extend to. Thus, where a power is, to lease for *ten years only*, and the donee thereof make a lease for *twenty years*, that shall be *good*, in equity, for the *ten years*, and bad for the residue.

Parry v. Brown, Nels. Rep. 87.
2 Vez. 641.

Thirdly,

Thirdly, In respect of the quality of the estate given. As, where the power warrants the disposing of an *absolute* estate, and the donee of the power gives a *qualified* one. In such case, the qualifications will be void, and the estate will be *absolute*.

2 Vez. 644. Thus, if a father, having power to appoint money or an estate to his children, qualifies his appointment by *annexing* a *condition* thereto, that they should release a debt owing to them, or pay money over; the appointment will be absolute, and the condition void.

Alexander v.
Alexander
2 Vez. 640.

Fourthly, In respect of the persons in whose favor the power is to be executed. Thus, where *James Alexander* devised a sum of 6000 *l.* to trustees, upon trust to pay the interest and produce to his wife for life, and gave unto his wife, "the absolute disposal of the same sum unto and *among such*
" CHILDREN begotten between them, and
" in such proportion, as she should by last
" will and testament, or other deed or deeds,
" writing or writings, to be executed by her
" in her life-time, attested, &c., direct,
" limit, and appoint," and directed the trustees to pay the same, according to her will and appointment; and, for want of such will or appointment, he directed, that the
said

said sum should fall into and go in the same manner, as the residue of his personal estate : The mother, there being *then* five of the children living, made her will, and therein recited her power, and, in pursuance thereof, gave to her daughter *Anne*, 1000 *l.* to be paid out of the sum of 5390 *l.* which she computed to be the only remaining sum of 6000 *l.*, after deducting what she had before paid to some of her children : And, as to the remaining produce, after payment of the said 1000 *l.*, she disposed thereof to her daughter *Mary* and son *James*, for their own respective use, each one full fourth part thereof, (the whole into four parts, equally to be divided,) and to the said *Mary* and *James* also the other remaining two fourth parts ; but, as to these last two fourth parts, upon the trust following, *viz.* as to one of the same, to place out or continue on securities, during the life of their sister, her daughter *Catherine*, wife of *Thomas Clipperton*, and to pay the interest thereof unto such person or persons, and for such purposes as she should from time to time direct, &c., and upon trust, at her decease, to pay and apply the principal of such fourth part to such child or children, if any, as she should happen to have living at her decease, in such manner as she should by writing under her hand in nature of a will or other-

otherwise appoint; and for want of such appointment, to such child, if but one, if more, to them equally: in default of such child or children, the principal of such fourth part, if she survived her husband, to be wholly paid to her for her only use and benefit. But if she died in his life, the said principal, at her decease, to go to the said *James* and *Mary*, yet for their own respective benefit only, as for one third part thereof to each of them; and, as to the other third part thereof, and also the other of such remaining two fourth parts, whereof no disposition was therein then made, upon trust to pay and apply the principal and interest thereof, or any part thereof, either from time to time, weekly, or otherwise, in such manner, as said *Mary* and *James*, their executors, administrators, or assigns, should in their discretion, think most beneficial for the personal support and maintenance of their brother, her son *Francis*, and his wife and children, but not for the payment of his debts. It was held, that the provision to *Catherine* for life, in the fourth part, was undoubtedly good, although the provision for the children of *Catherine* (this being in nature of a power) were not a good appointment, because a power to appoint to children would,

would, *in no case*, warrant an appointment to grand-children.

So, in the case of *Adams v. Adams*, it was held, that although *F.* the widow, had, in the deed of 25th. of *October*, 1771, exceeded the power reserved to her, under the proviso in the deed of 4th. of *July*, 1767, viz. " that " the said *F.*, did thereby reserve to herself, " full power and authority to revoke those " presents, and to limit all and singular the " premises to, or between, the *said children*, " (namely, *the children of the marriage*) or " any or either of them, in such manner, or " for such estate or estates, as she should " think fit," in as much as she had thereby limited estates to *her daughters* for life, with remainder to *their children* (her grand-children); whereas her power was confined to *child* or *children only*; yet, that the same ought to prevail so far as her power extended, and, therefore, that the limitation to her *daughters* for life was good; but, that *the disposition* of the inheritance to their *child* or *children* was void.

Supra, 288:
296.
Cooper 651.
et vid. Ro-
binson v.
Hardcastle,
Brown, Rep.
Ch. 1786.
22.

But, courts of law did not shew that favorable disposition to support the execution of powers, which pervaded courts of equity, without some difficulty, and not until long after

1 Lev. 150.

after the introduction of them into courts of law *in consequence* of the statute of uses; for, Lord *Hales*, and the court of King's Bench, in arguing on the case of *Jenkins v. Keymis*, held, that the mortgage in that case being for 2000*l.* and interest, and stipulated to remain for nine years, and the power being only to charge the hereditaments there in question with 2000*l.* it could not be upheld as a good execution of the power; for, *by that means*, he might *charge* all the estates *subject* to the power with a *great sum* of money, that would *defeat* all the settlement; and that the power was *entire*, and *so* was the *execution*, and that, *therefore*, it could not be made good for *part* and *void* for the *residue at law*. But *Hales* said, that perhaps there might be good ground in equity, to aid the execution as to the 2000*l.* And, in like manner, we find that the judges, in the case of *Peters and Marsham*, which came on, *Mich. 4 Geo. 2.* were extremely put to it, to get over a difficulty of this kind, which arose in that case. There *J. S.* seised of lands in fee, and likewise of other lands, devised all his said lands to his eldest son for his life; and, then devised such part of the said lands, as his said son should appoint, to such wife as the said son should marry, *for her life*, for the jointure of such wife, with contingent remainders

remainders to the first and every other son, with remainders over. The testator died. The eldest son, on his marriage with the plaintiff, conveyed the lands in question to trustees and their heirs, in trust to permit him to receive the profits during his life, and, after his death, to the use of the plaintiff, his intended wife for her life, and, *after her death, to the use of the heirs male of her body.* The marriage took effect, and then the plaintiff's husband being dead, she brought this action *for the lands* limited to her by the *aforsaid* conveyance, which had no other execution but sealing and delivery.

On a case made thereupon, by Mr. Justice *Fortescue*, for the opinion of the court, it was argued against the plaintiff's title, that, though this conveyance was not executed by livery, inrollment, or otherwise, yet it should enure as a covenant to stand seised, there being a sufficient consideration to raise an use that way; and then the plaintiff's estate *being greater than the power warranted*, would be *void*.

But, on the part of the wife, it was contended, that this conveyance could not enure as a covenant to stand seised, because the plaintiff's estate was to take effect by
way

2 Vent. 318.

way of use out of the estate of the trustees ; and, it had been adjudged, that a reversion being granted to *A.* to the use of *B.* and the grant not being executed by attornment, inrollment, or otherwise, it could not be executed by way of covenant, to stand seised to the use of *B.*; because the estate intended for *B.*, was appointed to arise out of the reversion granted to *A.*; and, for want of a proper execution of the deed, that conveyance was held void : And, upon that ground, it was said, that the conveyance in the principal case could have no other effect, but as *an appointment* in pursuance of a will, and *then* it was void for all above what was warranted by the will : as, if a power were given to make leases for twenty one years, and the person who was to execute such power, made a lease for twenty one years, and by the same deed, limited a further interest in this manner ; namely, “ *and from and after the term aforesaid, for one year more,*” the power had been well executed by the first limitation, and the excess was surplusage not to be regarded : So, where the plaintiff’s husband gave her an estate for life expressly, the appointment was compleat, and the remainder limited to the heirs of her body, was idle, and so to be rejected as not warranted by the power. And it was insisted, that this conveyance must be

be made good *from the intention* of the parties, and the part which was inconsistent with the legal execution of the power should be rejected.

But the court distinguished between the case put of the lease for twenty-one years *and one year after*, and the principal case; for, in the principal case, though the limitations were several and distinct, yet they made but *one estate*: and *Eyre*, Chief Justice, and *Denison*, Justice, took a distinction between a power to *limit* an estate, and to *appoint* the land; and they held, that, if this were considered *as an execution*, it would *not* be good, as it exceeded the power: but, that the power given to the son was *not* to *limit* the estate but *to appoint* the land; and *then* he was only to *ascertain* in what part of the land she should have her estate, and her estate was settled by the will: so that the question was, whether the marriage deed had not *sufficiently* specified, *what lands* she should have *by the will*? and they held, that it *could not* take effect as a *conveyance*, but that it *might* as an *appointment* and *designation* of the land she should have; and they said that, *though* it had *limited* an *inferior* interest, yet, it taking effect as an *appointment*, she should have an estate for life; for, her estate *took*

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effect by the *will* and not by the *deed*. But *Fortescue* doubted whether, if the son had barely appointed the land without limiting any estate, that would have been good. And judgment was given for the plaintiff, the wife.

But courts of law have, in modern times, adopted the same rule of construction of instruments, made in execution of powers, *in this respect*, as obtains in courts of equity; *by correcting* the excess, and *supporting* the execution of the power *so far* as is warranted thereby.

Supra, 288.
296. 349.

Thus, it was held, in the case of *Adams v. Adams*, that, although *F.*, the widow, had, by the deed of the 25th Oct. 1771, exceeded the power reserved to her under the proviso in the deed of the 4th of July, 1767, viz. "that *F.* did thereby reserve to herself
" full power and authority to revoke those
" presents, and to limit all and singular the
" premises to or between the *said children*
" of the marriage, &c.," *inasmuch* as she had *thereby* limited estates to her daughters for life, with remainders to *their children* (*her grand-children*), whereas her power was confined to "a *child*" or "*children*" only; yet, that the same ought to prevail *so far* as her power extended, and that *the limitation*

mitation to her daughter for life was good, but that the disposition of the inheritance to their child or children was void.

Again, where tenant for life of estates situated in *Ireland*, with full power of making leases for any term *not exceeding* thirty-one years or three lives, *to commence in possession*, at the least improved rent that could be had for the same, made a lease “ *from the date for and during the natural life and lives of three persons and the longest liver of them, or for the term, time and space of thirty-one years, to commence from the date, which should last longest, from thenceforth next ensuing, fully to be compleat and ended.*” On an ejectment brought, in the court of Exchequer in *Ireland*, by the heir at law and remainderman, and a special verdict returned thereon, the question was, whether this lease was good within the terms of the power? and on argument, before the barons, it was adjudged so to be; which judgment was confirmed on writ of error in the Exchequer-chamber there, before the Lord Chancellor of *Ireland*, assisted by Lord *Annaly* chief justice of the court of King’s Bench, the constituent members of that court. But Lord *Annaly* having, after long deliberation, fully delivered his opinion for reversing the judgment,

Commons,
Lessee of
Netterville,
v. Marshall,
7 Brown’s
Parl. Ca,
111.

ment, a writ of error was brought in parliament: and, on the hearing, it was argued on the part of the remainder-man, that the lease was bad, for that it was in manifest opposition to the power; because, *instead of* being a lease for one *or* the other of the terms *expressly*, as the power directed, it was a lease for *the one* or *the other*, as chance should direct: and, that he, being a purchaser for the most valuable of considerations, had a clear right to exact a strict performance of the condition annexed to his father's power of leasing. But it was contended on the other side that, in cases of this kind, all a remainder-man could reasonably expect was, that an estate, when it came to him, should not be charged beyond what was the intention of the settler to allow those who stood before him to charge it. That, it would not be so by the lease in question, if it were construed as a good lease for three lives *and no longer*. That, courts of law, who, in modern times had adopted the same rules of construction as obtained in courts of equity, in the construction of powers and of the instruments by which they were executed, would, when they had been exceeded, correct the excess, and support the execution *so far* as it was warranted by the power. That, the lease in question, *so far as* it was a lease
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for three lives, was clearly warranted by the power ; and this was apparently the primary object of the parties. Besides *this*, they had a second object in view, which was to secure the estate to the lessee for 31 years, in case the lease for lives should determine sooner. But this, whether it was considered as concurrent or contingent, was *not warranted* by the power. And the lease was adjudged good, and the judgment of the Exchequer-chamber in *Ireland* affirmed.

It has been already observed, that excesses in the execution of powers may be either by the appointment of a larger *interest* in, or *portion* of that which is the subject-matter on which the power operates than is warranted thereby, or by appointment to *persons, not objects* of the power, of part of the interest in, or of part of the thing itself, that is the subject of the power, or by annexing qualities and properties, *not required by the power*, to the interest or estate appointed under it ; we have likewise seen that, in these cases, the execution is *uniformly* good *as far as* it is warranted by the power ; but, the consequences of this doctrine, as to that interest, or part, in which the power is exceeded, will be various, according to the circumstances of the case. Thus, if the appointment

exceed in nominating persons to take part of the interest in, or portion of that which is the subject-matter of the power, to whom the power doth not extend, the appointment, *so far as* their interest therein goes, will be *utterly* void, and the *subject-matter* on which the power was intended to operate go *as if unappointed*.

Cowper 651.
Supra, 354

Thus, in the case of *Adams and Adams*, the court held, that, the appointment of the inheritance of the premises to the grandchildren, by the deed of the 25th of October, 1771, being void, *the son took an estate tail* therein, subject to the estates for life to his sisters *which were well appointed*, with remainders over, under the deeds of the 24th September and 20th October, 1764.

Per Sir T.
Clarke, in
1 Vez. 644.

So, if a man has power to appoint 1000*l.* amongst his children, and he appoints 100*l.* amongst the children, and 900*l.* amongst others *who are strangers*, the appointment of the 900*l.* will be *absolutely* void; and it will not be prevented from going over, if limited over for want of appointment, *in like manner* as if *no appointment* had been made.

But, if the appointment under a power exceed, by any *qualification* being added to
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the whole or a part of the interest in the estate appointed, which the power does not warrant; in such case, the appointment will not be void as to such part in which the excess is, but, the excess only will be void, and the appointment, as to that part, as well as to the rest, will be good.

Thus, if a father, having power to appoint 900*l.* between his children, having three, give 300*l.* a-piece to two of them *absolutely*, and *qualify* his appointment *to the third*, by *annexing a condition* that he shall release a debt owing to him, or pay money over, &c.; *the appointment will be absolute and the condition only void.*

Per Sir T.
Clarke,
1 Vez, 644.

And, if a power be to lease for *twenty-one years*, and a lease be made for *forty years*; that will be good for the *twenty-one years*, and void for the remainder. Ibid.

The ground and principle of these decisions is, that, where there is a *complete* execution of a power, and something *ex abundanti* added, which is not warranted, *there*, if the excess be distinguishable, so that the court can draw the boundary, the execution will be good, and *only the excess* void: but, where *the boundaries* between the excess

and the execution are *not* distinguishable, the execution will be *void* for the *whole*.

Supra 348.

But, one of the limitations, in the case of *Alexander v. Alexander*, furnished an exception to the rule above-mentioned, “ that where the boundary between the excess and the complete execution cannot be distinguished, the whole shall be void.” The limitation I allude to, is that of *one* fourth part of the 5390 *l.* appointed to *James* and *Mary*, their executors, administrators, and assigns, upon *trust* to pay and apply it in manner, as they, *in their discretion*, should think most beneficial for the support of *their brother Francis, and his wife, and children*. The court being clearly of opinion, that this appointment for the benefit of *Francis*, his wife, and children, was *no* proper execution *as to* *Francis*, because the wife and children were to have something, and, *so far as something was designed for them*, it was *bad*; and the *excess* being *unascertainable*, there being *no possibility to distinguish precisely how much* she intended for the mother, and *how much* for the children, so that the appointment could not be supported, unless some new ground could be found upon which it might be upheld; it became a question, whether, under the particular circum-

circumstances of this case, the execution of the power might not be made good in some other way? And it was held by Sir *Thomas Clarke* that it might; for he said, suppose the mother, instead of using the words she had done, had given the portion allotted to *Frances* and her children to be applied in such way, as should be most beneficial for her son, his wife, and children, if they should by law be capable; he should not have doubted, but that, *as the wife and children were not by law capable*, it would have been *absolute* to *Francis*; the question then was, whether there would be any difference between this case put, and the principal one? It bore an analogy, he said, to what the dispositions of the mother would have been, if she had given it to a son by name, who had never appeared to have had existence, or had never been capable of taking; if it had been given to these four *indefinitely*, and *three were incapable of taking*, the *fourth* would have had *the whole*, and *must* have taken it, as the others were incapable of taking. It fell, *therefore*, within the reason of *Humphries* and *Taylor*, where a personal estate was given by will to two in jointenancy; one was outlawed; and, therefore, the testatrix made a codicil, whereby she *adeemed* what was given to *one*
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of the two ; and the question was, whether the other joint-tenant should take the *whole* or only a *moiety* ? And the court held, that he was to take *what the other did not* ; for, they were to take the whole between them. The mother, in the principal case, never designed that *this* fourth part should *fall* into the residue, and it would be extremely hard that it should. *Then Francis would be intitled to the whole of that*, and his Honor decreed accordingly.

We have seen, that, where a limitation of an estate under a power exceeds the extent warranted thereby, the appointment is void as to *so much of the limitation* as exceeds the power, and can never come *in esse* ; but, it *not only* is void *itself* in that extent, but, although it fails to exist for want of persons to take under it, yet it *renders void* any *subsequent limitation* grafted thereon, although *limited pursuant to the power* : for, every instrument is to be construed as taking effect at the moment of execution, and *no subsequent event* can influence the construction of it, one way or another.

Supra, 347.
et vid. Robinson v.
Hardcastle,
Brown's Rep.
Ch. 1786,
page 22.

Thus, though the limitation in *Alexander and Alexander*, to the children of *Catharine* was void, as *an appointment to grandchildren,*

children, yet, it prevented *the limitation* over, in *case* of default of children of *Catbarine*, and of her death before her brother and sister *James* and *Mary*; *to them*, as to part for themselves, and as to part upon trust for *Frances*, &c. from taking effect. And *that portion*, it was held, would have been *unappointed*, although *Catbarine* had *had no children*; because, if *Catbarine* had left children *at the time* of her death, it would have been *impossible* that *any* of the limitations over could have taken effect; for, the children, *if any*, though they could *not* have taken themselves would yet *have prevented* the limitation over. Therefore it was resolved that the fourth fell into the residue, because, *as to that*, it was *no appointment* except *partially* for the life of *Catbarine*.

And, as the execution of a power will be good, though *it exceed* in some circumstances, if *that* which is authorized *thereby* can be distinguished *from that* which is *not* authorized thereby; so, *the execution* of a power will be good, though it limit a less estate in that which is the subject of it, than is warranted by the power.

Thus, a lease for *ten* years hath been held good in Chancery, upon a power to lease for *twenty-one* years.

Said in *Briers v. Bolton* to have been resolved in *Bridgman's* time, 3 *Keb.* 746.

So

Briers v.
Bolton,
3 Keb. 692.
20. 745. 15.

So, in replevin, where the defendant avowed upon a settlement, with power to *R.*, by deed or last will, to give or devise 200*l.* to any younger child unmarried, or, what on marriage, should be agreed to be paid, or an annuity out of the twenty acres in question, to continue *so long* after the devisor's death as the daughters *portion*, or *what* should be agreed on marriage, or any part thereof, should be *unpaid*, until they received 200*l.* a-piece.

Afterwards *R.* agreed to pay the defendant 150*l.* marriage-portion, and an annuity was granted until 150*l.* should be raised. The defendant avowed for a year's arrear. It was contended, on this point of the case, that, this was not good, any more than limiting an estate for *two* lives would be on a power to lease for *three* lives; but it was answered, that *the grant was* in the words of the power; to which the court agreed, and *Jones* and *Twysden* said it had been held, on the statute of leases, on the words, "otherwise than for three lives or twenty-one years," that a lease for a less period was good. And the principal case was adjudged for the defendant.

So,

So, where, upon a marriage settlement, *a power* was given to every tenant for life, when in possession, to limit hereditaments to any woman, he should marry, *for her life*, by way of jointure and in bar of dower. The tenant for life made a lease for 99 years *determinable* on the death of his wife: and it was held, on a special verdict on ejectment in the court of King's Bench, that, however she might be entitled to relief in a court of equity, yet, *at law*, it could never be *said* to be *an execution* of the power: for, the *estates* were very *different*, one being *a freehold* and the other *a chattel*, and the freehold in her being a qualification in any after taken husband to be a member of parliament, kill game, &c. But Lord Talbot held the lease to be warranted by the power, saying, that it was not *a defective* but *a blundering execution*: and he decreed the defendant to pay all the costs both in law and in equity.

Rattle v.
Popham, 2
Strange 992.

¹
2 Burr. 1147.
1 Vez. 644.

Where either a real or personal fund is made subject to the execution of a power, and a loss happens to the fund, the claimant under the power will not be obliged to bear any part of the burthen, if there be a sufficient part remaining to answer the charge thereupon under the power.

Thus,

1 Vez. 138.
supra, 93.
96. 100.

Thus, in the case of *Oke v. Heath*, it was insisted, on the part of the husband who survived, that *a loss*, which had happened upon some of *the funds*, on which the 1000 *l.* there settled was laid out, should be borne by the *whole sum*, and *not* by the *residue* above 4000 *l.*, according to the maxim, that where there is a loss to several parties standing in the same circumstances, it shall be borne equally, unless there be some special agreement to the contrary. But, the court said that, as to the loss, it must fall upon the residue above the 4000 *l.* which was not to be burthened with any part of it. That, had lands been purchased and settled according to the first trust, and *afterwards* fallen in value, or been partly swallowed up by an inundation, still the 4000 *l.* must have been raised, and *the owner* of the inheritance could have had *no* right against the *cestui que trust* of the term, to say, *he* should bear part of the loss. The *rule* then must be the same, although it were not laid out in lands but in securities.

Any interest that a man is intitled to by virtue of a power, after the execution of that power, is looked upon, in equity, as *part* of his *estate*; and, *as such*, will be subject to his creditors.

Thus

Thus, where one, in his marriage settlement, created a term for 500 years, in trust to raise any sum not exceeding 6000 *l.* viz. any sum not exceeding 3000 *l.* for younger children, and *any further sum not exceeding 3000 l. for such purposes as he should think fit.* He appointed the latter sum to be a collateral security for the quiet enjoyment of an estate he had sold, on the title to which there was some doubt. Afterwards he, by will, appointed the 3000 *l.* subject to the collateral security, and *also the other 3000 l.* to his daughter. On his death a bill was brought by a bond creditor, to have his debt discharged out of the 3000 *l.* *subject* to the indemnity of the estate purchased, *the gift* to the daughter being *voluntary*, and therefore *void* as against him. And it was said, that the will was a devise, *not a further appointment*; for, there was a compleat appointment before, though not a disposition of the whole 3000 *l.* But, the Lord Keeper decreed the 3000 *l.*, subject to make good the indemnity, to be liable to the creditors, because *he* had a *resulting* equity in it which he might devise, but not to take place of creditors: and his lordship held, that he had *before* made an appointment, which satisfied his power.

Laffells v.
Lord Cornwallis, Pre.
Ch. 232.

And, though one, having a power to appoint, actually execute it in favor of third persons, yet, if there be creditors not satisfied, it will be considered, as to them, as part of the estate of the appointer, and subject to his debts.

Thompson
v. Towne,
2 Vern. 319.

So, where *I. S.*, on sale of lands, took a bond from the purchaser, to pay any sum or sums of money not exceeding 500 *l.* as he should by will appoint. *I. S.*, by will, distributed it, and appointed payment of it to several of his relations. A bill was brought by the creditors of *I. S.* for satisfaction of their debts out of assets, and, *inter alia*, to have the 500 *l.* appointed, applied in part payment. *Et per curiam, I. S.* having power to dispose of the 500 *l.*, it must be looked upon as part of his estate; and it was decreed to be assets liable to the plaintiffs debts.

And, even if the donee of a power appoint to a third person, *with a recommendation* to him to appoint to persons or uses particularly mentioned, yet, if the donee under such appointment, hath *an interest* in this subordinate power, so that it is *optional* in him *to pursue* the recommendation or *not*; in such case, the *claim* of his *creditors* will
be

be preferred to *that* of the persons to whom he has appointed; for, they claim under the appointment or gift *to him*, which is *paramount* his disposition under the recommendation.

Thus, where 300 *l.* was agreed to remain a charge upon land until it could be laid out in the purchase of lands of inheritance, to be settled in trust for *T.* for life, and, after his decease, in trust for *M.* his wife for life in augmentation of her jointure, with other limitations for the benefit of the younger children of *T.* and *M.*; and, for want of such issue, *to the use of such person or persons, and for such estates as the said M. should, by any deed in writing, direct or appoint, and, for want of such direction, to the right heirs of M. for ever.* After marriage, *M.*, by deed, appointed the 300 *l.* to her husband *T.* *to be employed* by him to *such* charitable uses, or *other* purposes, or intents, as *he* should think fit. Then *M.* died, and *T.*, there being no issue of the marriage, by his will, after other bequests, *devised* 100 *l.* a piece, being the money charged on the said estate, and appointed to *T.* by his *late* wife, to *W. S.* and *T.*, three children of a poor clergyman brother to *M.* unprovided for, and declared

Hinton v.
Toye, 1 Atk.
465.

in his will, that *such* disposition was *in pursuance* of her direction. The creditors of T. brought a bill to have the 300 l. applied to the payment of their debts, as part of his assets. On the part of the legatees of the 300 l. it was insisted, that T. had *only* a naked power to convey this sum to *some charitable* uses, pursuant to the appointment of the wife; and that *the will* should be taken as an *execution* of such power, and as a disposition in charity according to that appointment, *not* liable to the testators debts. *Sed per curiam*. The question was whether M., the wife of T., *considered him* as a *trustee* of the 300 l. and a *bare* instrument to convey to other persons, or, whether *he* had the *ownership*? If it were his *own* property, certainly *no* act of his *could dispose* of a creditor's *right*. If a man had the use of a thing, (and T. plainly was entitled to it *for his life* at all events) and *the power* of giving it to whom he pleased, he was *undoubtedly* the owner of it; *this power* T. very plainly had; for, there were but three ways of property, namely, enjoying in one's own right, transferring that right to another, and the right of representation. *Here*, it was given to be employed in *such* purposes as the husband should think fit; could there *then* be *any purpose* in the world but *he* might employ it

it in ? The only doubt, it was said, was, upon the words “ *charitable uses,*” and indeed they did intimate that the wife had some wish her husband would so employ the 300*l.* or, at least, recommended it to him to dispose of it in charity ; *but she* had not *tied him* down to it ; for, the latter words left it *absolutely* at *his* discretion, to dispose of it *to any purposes or intents, as he should think fit.* In this case there wanted *no* preceding act to make *this* exist in the husband ; for, the money was *actually* directed to be paid *into his hands* : could *he* not therefore have *lain it* out in a mortgage, or *lent it* upon bond, or *even* thrown it into the sea ? so that no stronger instance could be given, *than this,* to prove ownership and property. And, though *T.* said, in his will, that it was in pursuance of the direction of his dear wife, yet *a man* could not, *by any expression in his will,* alter the nature of his estate and disappoint his creditors, who had no occasion to resort to his will, but claimed by an interest precedent, namely, by *the deed* of appointment by his wife, *whereby* they shewed that *their right* commenced *from* the wife’s execution of the power given her by the marriage articles. There was no instance in the court, of a construction in *favor* of legatees to the *prejudice* of creditors, unless *the creditors* founded *their right* under the

will itself, which they did not in the principal case.

Supra 348.

2 Vez. 645.

An appointment of an interest in land or money, under a power, cannot be made with *an exemption* from the debts of the appointee. Thus, it was held, in the case of *Alexander and Alexander*, that the limitation, under the power, of part of the fund subject to the power, to *Mary and James*, upon trust, to apply the principal and interest thereof, from time to time, weekly or otherwise, as they should think fit, in manner most beneficial for the personal support and maintenance of their brother *Francis*, his wife, and children, *but not for the payment of his debts*, so far as it *exempted it from debts*, was a *bad* appointment; for, in that restraint, the appointer had exceeded the power *given by law*, because the interest in the fund, when appointed, *must be left* to take the fate of *being Francis's property*, and, of consequence, would be *subject* to be come at, as *his creditors* should think fit.

A power given to one person, cannot be by him delegated to another; for, if there be a power to *A.* of *personal* trust and confidence, to exercise *his* judgment and discretion, *A.* cannot say, that *that* trust and confidence

fidence shall be exercised *at the discretion of B.*, because it is a maxim that *delegatus non potest delegare*.

Thus, where one, by marriage articles and settlement, had a power of disposing of a reversionary interest in copyhold land, (subject to an estate for life in his wife), among the issue of the marriage, in such shares and proportions, as he should think fit; and, for want of such appointment by the husband, then the reversionary interest was to go to his right heirs: The power was directed to be executed by deed in his lifetime, or, by will at his death. *He by his will*, reciting the power under the articles and settlement, *delegated it* to his wife, that she might, *in such shares and proportions as she should think fit*, dispose of it between his son and daughter, and, for want of such appointment, gave it in equal shares between his two children. *Et per curiam*, this was to be considered as a power of attorney which could be executed *only* by the husband, *to whom* it was *solely* confined, and was *not*, in its nature, transmissible or delegatory to a *third* person: therefore, the intermediate appointment to the wife, under the will, was *absolutely* void: and *the latter part*, where he gave it in equal shares between

Ingram v.
Ingram,
2 Atk. 88.

the two children, was a *good* appointment within the marriage articles and settlement.

Att. Gen. v.
Berryman,
cited, 2 Véz.
645.

So, in the case of the *Attorney General v. Berryman*, where a personal estate was given to such charitable use as *B.* should appoint; a direction by *B.*, that the *money* should be applied *as his brother* should appoint, was disallowed by the court.

Sap. 348

And again, it was held, in the case of *Alexander v. Alexander*, that the *discretionary power* vested in *James* and *Mary*, as to that *part* of the original fund limited to them, upon trust to apply the same, *at their discretion*, in manner *as they should deem most beneficial* for *Francis*, his wife, and children, was *not* good.

How v.
Whitfield,
1 Vent 338,
9. infra.

But, if a power be expressly reserved to be executed by one and *his assignees*; in such case, an execution by an assignee will be good: and a devisee will be a good assignee within the words of such power.

How v.
Whitfield,
Sir T. Jones
110. S. C.
1 Ventris
338, 339.
2 Show. 57.

Thus, where a fine was levied of certain lands to the use of *F.* for life, remainder to *I.* his son and the *heirs male* of his body, remainder to *I.* his executors and assigns for eighty years: and that he and his assigns of the

the aforefaid term, fhould have full power and authority to demise, &c. for 21 years or three lives rendering the ancient rent, remainder over in tail. *I.*, the fon, devised this term to *I. N.*, and died without issue male; the executors affented to the devise. *I. N.* entered, made his executors, and died. The executors assigned the term to *N.* with power to make leases. The assignee made a lease accordingly: and the question was, if the power annexed to the term for 80 years, were transferable with the term to assignees *in law*, namely, the executors? And it was contended, that it was not; for, executors were not within the power, and consequently their assignees were not. And a distinction was taken between an interest and a power. And this was faid to be a power merely collateral to the estate, and that fhould not run with the land; for, if it did, then the King by forfeiture or outlawry, the assignees of commissioners of bankruptcy, the vendee of the term of a sheriff upon an execution, &c. fhould execute this power. It was like covenants annexed to leases, which the assignee could not take advantage of till 32 *Hen. 8.* But the court were all of opinion, that the power was *well* transfered, and had been good if reserved to a stranger; but here it was annexed to an interest, and *not* meerly

collateral. And it was said, that the extent of the power did not abridge the liberty of him, that had the entire estate to dispose of as he would. And that the assignees in this case, might execute the power, and the court conceived that assignees might include assignees in *law*, as well as fact; but that, however, the tenant for life devising this term, the devisee was an assignee, and the power, in the greatest strictness of acceptance, was *in fieri*, and, consequently, must go to his executors, and, *by the same reason*, to their assignee.

But it seems, that an executor would not be capable of taking an interest, as assignee *in law*, under a power reserved for securing money or other thing to such person or persons, as the donee should name and appoint the same to be paid to; for, a distinction hath been taken between *cases* where *any thing testamentary* is covenanted to be done to a man and his assigns, and those where an assignee *in deed* is meant to take the benefit of the power to his *own* use.

Pease and
Stileman v.
Mead, Hob.
9. et vid.
Moore 855.

Thus, where *P.* and *S.*, executors unto *H.*, brought an action of debt against *M.*, upon an obligation of 30*l.* the condition of which was, that *M.* should pay 20*l.* to such person

person or persons, *unto whom H. should, by her last will and testament in writing, name and appoint the same to be paid.* The defendant pleaded, that *she* did appoint *no* person to whom the same should be paid: the plaintiffs replied, that *she made her will in writing, and thereby made them her executors.* Hereupon the defendant demurred in law. And the opinion of the court was, *clearly, that the money was not payable to the executors; for, though when any thing testamentary was covenanted to be done unto a man or his assigns, that was to be done to the executors, when there was no actual assignee, as a covenant for delivering of rentals to a man and his assigns, because the word assignee was then indifferent both to the assignee in deed and in law, and then, when the executor took it, he had it to the use of the testator; yet, in the principal case, the words must be understood of an assignee in deed, who should take it to his own use; for the word "paying," carried property with it.*

The joining of a stranger in the instrument by which a power is executed, will not affect its validity under the power. Thus, where, on recovery and settlement of an estate on N. for life, remainder to C. in tail, remainder over,

Jenkins v.
Keymis, su-
pra, 126—
129.

over, a power was reserved to *N.*, by deed in writing to charge all and singular the hereditaments in question, with the payment of 2000*l.* *N.* and *C.*, after reciting the power, conveyed the fee of the premises in mortgage by lease and release, upon condition to be void on payment of the sum borrowed and interest; it was said, and agreed to, by the court, that, *notwithstanding C. joined in the conveyance, it would have been a good execution of the power, had there been no other objection to it.*

We have already observed, that powers not simply collateral may be released, and that *thereby* they are determined; it is necessary here to observe, that the usual practice in conveyancing is, to release powers and all further claim to them, whenever they are completely executed or *there is no intention to go any further in the exercise of them.*

If a power be executed *upon a consideration* deemed, in equity, *immoral*, the execution will be *set aside there.*

Stribblehill v.
Brett. Prec.
Ch. 165. S.
C. 2 Vern.
445.

Thus, where *T.* (seised for life of a rectory, with power to make leases, remainder to his first and other sons, remainder to *W.*), demised this rectory for 99 years, if three lives lived

lived so long, in trust for *E.*, and died. Soon after his death *W.* made another lease of the same rectory in trust for *E.*, who, wanting money, borrowed 2000*l.* and mortgaged the leases for security of it. *E.* died intestate. The lives mentioned in the first lease died. In a suit in chancery upon these leases, in avoidance of the latter lease, made by *W.*, a title was set up under a lease, purporting to be made by *T.* a little before his death to *B.* for the consideration of 3600*l.*, which *B.* had made a voluntary assignment of to his nieces. It was objected to this lease, that, although it imported to be made for 3600*l.* yet no money had been ever really paid for it: and that, if the lease were actually made, it was upon a marriage brocage for *B.*'s procuring a marriage between *T.* and *O.* To this it was answered, there had not been any sufficient proof, that the lease was made on such a consideration as was pretended; and that it could not be expected, that, after such a length of time as 20 years, proof should be made of the payment of the consideration money, especially by assignees who were strangers. *Sed per curiam*, if it be a lease for a marriage brocage, it must be set aside, being *ex turpi causa*; and there is no difference between a bond or lease. But, the proof not being full enough, the court ordered

ordered a trial at law. It was tried at law, and upon two verdicts for the defendants, the assignees of the lease, the bill against them was dismissed; but it is said, in both reporters, that upon appeal to the lords, the decree was reversed, and the lease set aside without regard to the verdicts.

But this fact seems to be doubtful, for the case referred to in *Prec. Ch.* 166. as to this point, *viz. Show. Parl. Ca.* 76., appears to be that of another claimant on the same marriage, being merely a question upon a bond, and not one word of the lease or verdict is mentioned. The Case was in *Trinity Term* 1701.

If a power be badly created, as if it be so raised that it cannot be exercised, it will not *therefore* devolve on the court of chancery; for powers devolving on the court of chancery, are confined to *such* as are *well* created in the original, but, *by accident*, as the death of persons, &c. *cannot* be *executed* by those persons. In such cases there is a natural *substitution* of the court in *the room* of those persons. But, if a power be void in the *original*, there is *nothing* to devolve on the court.

Thus,

Thus, it was held, in the case of *Alexander* Supra, 348.
and *Alexander*, that the power limited to
James and *Mary* (as to the portion of the
fund appointed to them, in trust to be ap-
plied for the benefit of *Francis*, his wife, and
children), to apportion it *in their discretion*,
though not exerciseable by them, because
delegatus non potest delegare, did *not* devolve
upon the court.

A deed of appointment of lands situated
in a registred county, made pursuant to a
power in an instrument, is within the mean-
ing and intent of the statutes respecting the
registering of deeds.

Thus, where the plaintiff's bill was found-
ed upon a mortgage deed made in *September*
1746, and praying to be paid 500*l.* advanced
by him thereupon and interest, or to have
the estate sold and to be paid thereout ; the
objection thereto was, that the mortgagor had
no power to convey to the plaintiff, because
he had, before, properly conveyed or ap-
pointed the premises for the benefit of others ;
for that, by deed and fine, this estate had been
settled in 1742, to the use of him and his
wife, and, afterwards, to such uses as he and
she or the survivor by deed or will should
appoint, and that his power was, by a deed in

Scrafton v.
Quinsey, 2
Vez. 413.

1744,

1744, executed by the husband and wife, and appointments made therein for the benefit of the defendants, who, therefore, claimed prior to the plaintiff's mortgage in 1746. It was answered, that the appointment of the uses of that deed and fine could not be set up against the plaintiff, because the premises laid in *Middlesex*, where there was a register act by which this deed of 1744 would be void against the plaintiff as not being registered until 1748: whereas his incumbrance was registered in 1746, immediately after the date.

For the defendants it was argued, that this deed, in 1744, was not of such a nature as was required by the statute to be registered; and it was compared to the case of a devise of a copyhold wanting the formalities in the statute of frauds, which statute had very general words; yet, though such devise had no attestation at all, it would pass, because it passed not by the will, but by the antecedent surrender: which shewed that the court would take into consideration the *nature* of the instrument, to see whether or no it was within the act of parliament. That was indeed the case of a will, this was a deed or conveyance, but not a deed or conveyance *within* the statute; for, the defendants derived

rived no interest under the deed, but it was a mere power of appointment, and so, like a will of copyhold, was not within the statute of frauds. The defendants therefore, it was contended, would have a prior title.

Sed per curiam. Consider the intent and meaning of the act. This case was clearly within the mischief recited; for, here was a person, in 1746, lending out his money on landed security, and what was to defeat him was a deed in 1744 prior to him: he was clearly the very person intended, being, by a secret or pocket deed, to be defeated of the incumbrance he had advanced his money for, and taken care to register. He had used all due diligence required by the statute, and was therefore *prima facie* intitled to the relief pray'd. Next, to consider whether the deed or instrument was of such a nature as to be within the provision of this act. The words were general, "all deeds and conveyances." This was undoubtedly a deed, was executed as such, and operated so as to affect lands, tenements, and hereditaments, because those, claiming under the execution of a power, claim under a deed, which, as far as it can operate, affects lands, &c. But it had been said, that this deed

was not to be considered as a separate conveyance, but only as the execution of a power, and that all the interest arose under the deed of 1742. If that construction was to prevail, there would be an end of the registry and of the act of parliament; for, by this means, a secret deed might be set up to defeat a purchaser who had registered before. This *then* being a conveyance actually affecting the lands, though in virtue of a preceding power in another deed, was within the intent of the statute, and, in common understanding, such an incumbrance as ought to have been registered; otherwise an innocent person, induced to lend his money on landed security, would be defeated. The plaintiff, was therefore to be considered as a prior incumbrancer.

O N

Leasing Powers.

HA V I N G, in the preceding part of this essay, attempted to delineate the *several* kinds or species of powers, and to point out the properties and qualities particular to each; the next topic to which I shall call the attention of the reader, is the consideration of the *nature* and *effect* of Leasing Powers.

It is not necessary, in a tract of this kind, to point out the precise time at which this particular modification of an use was introduced; it being sufficient for our present purpose to know, that this *species* of power is to be found in our books, very soon after uses fell under the jurisdiction of common law courts.

When the mode of conveying estates in that form which we call strict settlement, became general, the necessity of inventing

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some such species of power must soon have been evident, to those whose habits led them to the contemplation of this branch of our law : for the inconveniences that must have occurred to a tenant for life for want of it must have been obvious to every one. Tenant for life without such power had no means of insuring to his lessee any certain interest in his lands, since he could create no estate therein to last beyond the limits of his own. A tenure so uncertain afforded very little encouragement to induce the farmer to improve, as whatever sum he might expend, the death of his lessor would put an end to his interest and vest the estate in the remainder-man ; who might then reap the fruits of his labor and fortune, either by making him pay a rent in proportion to the additional value arising from the improvements of the lessee, or, on his refusal to comply with those terms, by evicting him and taking in a new tenant. Keeping tenants therefore in a situation so fluctuating was equally prejudicial to the interest of the tenant for life and the remainder-man ; for the tenant for life suffered, because no lessee would pay an adequate rent for a lease on which he was afraid to embark his capital, from the apprehension that he might be evicted on the sudden death of his lessor before

before he had reaped the advantage of it; and the remainder-man suffered, from the estate coming to him in a neglected and unimproved condition. To encourage those therefore who were skilled in the arts of husbandry to apply their attention and fortunes in the cultivation and improvement of lands, it became necessary to secure to them a fixed and certain period in the occupation and manurance of them; in order to do which, it was necessary that the tenant for life, under such settlement, should be empowered to secure to his tenants a certain time in their estates in all events; with a view to effect which, leasing powers seem to have been invented. But as the introducing general leasing powers would have been of as great prejudice to the remainder-man on the one hand, by putting him in the power of the tenant for life, as the want of such a power was, on the other hand, to the tenant for life and the remainder-man, by discouraging the tenants from improving the estate, it therefore became customary in the creation of such powers to restrain the tenant for life to convey only a certain interest, upon precise terms, and in a certain manner prescribed by such power. So that as, on the one hand, the power to lease was invented principally for the be-

nefit of the tenant for life, fo, on the other hand, the restrictions and limitations of that power were added for the benefit of the remainder-man.

From the object therefore which the creation of this kind of power hath in view to attain, namely, an equal benefit to the tenant for life and remainder-man, by enabling the former to let the lands subject to the power on the most advantageous terms to himself, and securing to the latter, in case of the death of the former, the benefit of those terms, no construction is to be put thereupon to favor the tenant for life at the expence of him in remainder; for, the intent of the creator of the power being to benefit both equally, namely, the tenant for life in particular by the creation of the power to lease for a time that may exceed his interest in the land, and the tenant in remainder in particular by the restrictions put upon the tenant for life, no strict or forced construction ought to be put upon the restraining words in such a power, in order to support any estate made under it not precisely pursuing the terms of the power; for, the only benefit such power intends for the tenant for life, is, the enabling him to let at a fair rack-rent, thereby to
give

give him the most beneficial enjoyment of the estate that it is capable of during his time, but the power intends him no advantage from thence after his time in the estate ceases; but, on the contrary, means to secure to the remainder-man, when his interest comes into possession, every advantage that can accrue from the fair produce of the estate.

The restrictive part of such power then ought to be construed strictly against the tenant for life, and in favor of the remainder-man; because the circumstances required to attend the execution of such a power are particularly specified with a view to secure his interest, and are shackles placed upon the tenant for life for the benefit of the remainder-man.

The lessee then under such a lease, standing only in the place of the tenant for life, and deriving no interest under the lease but by virtue of the power, has no claim to any favor, further than as he acquires a legal title thereby. He must stand or fall by that title *only*, and if that will not bear him through, as *effectually* made under a complete and perfect execution of the power, the right of the remainder-man to possess

the estate free from the lease, will take place of the right of the lessee, as superior to it. For, in this case, the lessee has no claim to any equitable interposition in his favor, but, must rest his title on the legal execution of the power. In the constitution of a lease therefore under such a power, every circumstance required by the power must be strictly complied with, or the lease will be void.

The circumstances required to attend the execution of such leases may be considered.

First, With relation to the lessor.

Secondly, With relation to the lessee.

Thirdly, With respect to the subject on which the power is to operate, *viz.* the hereditaments:

Fourthly, With relation to the quality of the interest to be granted, and to the quantity thereof. And,

Fifthly, With relation to the rent to be paid for the same.

First,

First, As to the lessor. It was resolved in the case of *Lady Gresham*, that if *A.* be tenant for life, the remainder in tail, &c. and *A.* has power to make leases for twenty-one years, rendering the ancient rent, &c. he cannot make a lease by letter of attorney by force of his power; because he has but a particular power which is personal to him.

Lady Gresham's case,
cited, 9 Rep.
76. S. L.
Palmer 436.

Secondly, As to the lessee. It seems that the lessee in every such lease, must be a person in being at the time when it is made; for, it is said to have been laid down *per Noy*, attorney general, that if a power be to make leases to one, two, or three persons, the donee of the power cannot make a lease for the life of the *first* son of *J. S.* because the person to take under the power ought to be *in esse*.

T. Raym.
163.

Thirdly, As to the subject on which the power is to operate, *viz.* the hereditaments.

If a leasing power be restrained to be exercised only over hereditaments usually letten, lands twice letten are included within that description.

2 Roll. Abr.
261. 12.

But lands that have been but once letten are not within such a power.

Ibid. 13.

2 Roll. Abr.
262. 14.

So if lands be leased by contract from year to year for three years ; they are not within such a power, for that is but one lease.

And any kind of demise is sufficient to support such power, there being no necessity that it should have been demised by indenture ; a demise at will, or by copy, is sufficient to make land to be accounted demisable under such a power.

Baugh v.
Haynes,
Cro. Jac. 76.

Thus, where copyhold lands demisable for three lives, were letten by a dean and chapter for three lives: it was objected that the land was not usually demisable by indenture but only by copy ; and so it was not land usually demisable. But it was resolved that this land should be accounted usually demisable, when it was always demised : as if usually it had been let at will at the common law rendering rent, such land was said to be usually demised, and such rent might be the ancient rent.

Dean and
Chapter of
Worcester's
case, 6 Rep.
37.

So, where the Dean and Chapter of *Worcester*, seized of the manor of *Hambleton* in fee, by indenture 24 *Eliz.*, demised the same to G. and his assigns for three lives and the survivor of them. It was objected by the successor upon the statute of the 13 *Eliz.* that

that this land had not been usually demised; for a demise, in this case, was to be intended of a demise at common law, and not of a customary demise whereof the common law did not take any notice. But it was answered and resolved, that the estate granted by the copy was, in judgment of the common law, an estate at will; and, without question, lands which had been accustomed to be demised at will by those that had the inheritance of the lands rendering rent, were lands accustomedly letten to farm within the said act.

Again, where land that was copyhold for life was surrendered by one, seised thereof for life, to the lord of the manor in tail, the reversion being in the crown. The said tenant in tail made a lease for three lives; and, one question was, whether this land should be said to be usually demised within the statute 32 *Hen. 8.* having never been demised before but by copy? *Et per curiam*; it should be so considered.

Banks v. Browne, Moore 759.

But it should seem that, if land had been twice letten by *one* tenant for life, or by guardians of an infant tenant for life, having power to lease, or the like, which land, before that time, had not been usually letten to farm;

Vide Co. Litt. 44 b. Dyer 271. b. Degge. 106.

farm; their letting to farm such lands would not empower a tenant for life, coming in on the death of the former tenant for life, to make a binding lease of such lands within the power, when he came into possession. For, the intent of such *powers* is only to make leases of such parts of the land, as *have* been usually letten by those who were owners of the inheritance, and were therefore the most competent judges of what was proper to be let out, or what was not so, and is not to warrant leases of any other possessions than of those which the owners of the estate have usually letten. For, if the leases of such tenant for life, or guardian, should be a letting within such power, a subsequent tenant for life, or in tail in such settlement might, when he came into possession of the estate, find the mansion-house leased out under the power, contrary to the meaning of the power, because a prior tenant for life or guardian had made temporary leases during the continuance of their interests. *Sed quære.*

But lands not demised by the space of twenty years before the execution of a power, to demise at the rent then usually reserved or paid, cannot be leased under it.

Thus,

Thus, where there was a tenant for life with power to make leases of *all* or *any* of the lands in an indenture of settlement particularly mentioned, which *at any time* theretofore had been *usually letten* or *demised* for and during the term of twenty-one years or under, in possession and not in reversion, reserving the rents therefore then usually yielded or paid or *more*: tenant for life made a demise of part of the premises contained in the settlement which had been let at 100 *l.* *per annum* for twenty-one years; but the term or time of twenty-one years was expired, and the premises had not been letten by the space of twenty years before the demise under the power which was the subject of dispute. The question was, if these lands came within the description of lands at any time heretofore usually demised? *Et per Vaughan*, C. Just. the word usually demised might be taken in two senses: the one for the often farming, or repeated acts of leasing lands, to which sense this case did reasonably extend. The other sense of usually demised was for the common continuance of lands in lease, for that was usually demised; and so lands leased for 500 years long since, was lands usually demised, that was, in lease, though it had not been more than once demised, which was the more received

Tristram v.
Countess of
Baltinglass,
Vaugh. 31.
S. C. Sir T.
Jones 27.

ceived sense of the words usually denised. The meaning of the words *at any time* was various. If it were asked by way of question, were you at any time at *York*? it was the same as were you ever or some time at *York*. So, in the question, was this land at any time in lease? was the same as, was it ever, or some time in lease. But when the words *at any time* were not part of a *question*, but of an *answer*, they had a different and contrary meaning; as if it were asked, where may I see or speak with *John Styles*, and it were answered, you may speak with him or see him at any time at his house; there the words *at any time* signify *at all times*, and not, as in the question, at *some time*; so, where the words were used by way of a plain enunciation, and not as part of a question or answer; as *you shall be welcome to my house at any time*, they signify, *you shall be welcome at all times*. So in the principal case, if it were made a question, *was such land heretofore at any time usually letten and set to farm?* it imports, in the question, was the land ever, or at some time heretofore (how long ago soever) usually let to farm. But, by way of enunciation, if it were said, this land was usually let to farm *at any time heretofore*, it means this was commonly at all times heretofore let to farm. So, this land was usually in pasture
at

at any time heretofore, signifies, this land was always, or commonly in pasture heretofore. So, you may lease any land heretofore letten to farm at any time usually, is the same as heretofore letten to farm commonly at all times. And this construction of the proviso agreed with both the words and intention of the settlement. But what was not farmed at the time of this proviso made, nor twenty years before, could not be said to be at any time before commonly farmed; for those twenty years was a time before in which it was not farmed.

But to come closer, the proviso was, that leases might be made for twenty one years of any of the lands in the deed, reserving the rents thereupon reserved *at the time* of the deed made, which necessarily implied, that the land demiseable by that proviso must be land which *then* was under rent; for when no rent *then* was, the rent *then* thereupon reserved could not be reserved. But the premises in question had *then* no rent upon them, for they were not let of twenty years before nor then, and therefore were not deviseable by that proviso. The words, *or more*, would not at all help the lessee; for the words, *more or less*, were words of relation, the one of addition to what was before,

before, the other of diminution ; for *more* or *less* must relate to something positive before, and could never be a relation to nothing. So *more wages* necessarily implied some before, *more meat, more drink*, and, in every expression, *more*, denoted a relative to somewhat before of the kind ; and, in the present case, reserving "*more rent*," must imply some before reserved. And therefore, where none was at the time of the deed made 12 Jac. there could not, in any congruity of speech, more be reserved or intended to be reserved.

Winter v.
Loveday,
Comyns 37.
S. C. 1 L.
Raym. 270.

Where a manor and other hereditaments were settled with a power to tenant for life to make leases, so as the said leases were not made of such part of the said manor as were the demesne lands thereof, and there were other lands which the lords of this manor used to hold in demesne ; a lease was made of lands which were parcel of the lands held of the said manor by copy according to the custom. And it was held, by *Holt, Turton*, and *Eyre*, that this power did not warrant a lease of copyhold lands held of the manor ; for customary lands were part of the demesnes of the manor, and the pleading was, that the lord was seised of a manor *in dominico suo ut de feodo*. A manor consisted of demesnes
and

and services, and upon the grant of a manor the tenants ought to attorn for their services; but copyholders had no occasion to make an attornment, for their tenements passed by the grant as parcel of the demesnes. And if a common person granted all the demesne lands of a manor, the copyhold tenements held of the manor passed, for they were parcel of the demesnes of a manor: But they said, that it had been objected from the bar, that if customary tenements were parcel of the demesnes of a manor, then here was nothing that could have been demised, and yet it was intended, that the tenant for life should have power to make leases of so much of the manor as was not the demesne. To which it was answered by *Turton* and *Eyre*, that there were other lands mentioned in the conveyance to which the power to make leases might extend. But *Holt*, thought, that this was not a full answer; because it appeared to be the intent of the settlement, that part of the manor might be demised: And he was of opinion, that the rents and services might be demised within the power.

A covenant to stand seised is considered, in law, as an evidence of the usual manner of demising. As where lands were conveyed

on

Right on the
Dem. of Bas-
set v. Tho-
mas, et al.
3 Burr. 1441.

on a marriage to trustees and their heirs to the use of one for life, remainder to his first and every other son in tail male, &c., with a proviso, that it should be lawful for tenant for life and his wife, during their respective lives, and the son and sons of their respective bodies, and the heirs male of such son and sons, and the heirs male of tenant for life, as they should be severally and successively in possession of the freehold by virtue of the limitation aforesaid; and for the said trustees and the survivors and survivor of them, and the heirs of such survivor, *during the minority* of any such son or sons, or issue male, at any time or times, by any deed or deeds to be signed and sealed by him or them respectively in the presence of two or more credible witnesses, to demise, lease, &c. to any person, &c. either in possession or reversion for one life, or for two or three lives, &c. all or any part of the said premises, *which had been usually so demised and letten*, so as there should be no more than three lives in being at one time, &c.

A lease was afterwards made by indenture, &c. bearing date, *June 24th, 1742*, between the trustees in that settlement named (there being a minority), and J., of certain part of the premises, in consideration of a fine paid,

a certain yearly rent, and a specific sum for a heriot.

And several old leases of the premises in question were shewn, some in *Queen Elizabeth's* time, and others in *Henry the 8th's* time, some for years, and others for 99 years determinable on three lives: And among the rest, an indenture tripartite, bearing date the 15th of *December*, 1638, whereby one of the ancestors of the present tenant for life, seised in fee, in consideration of natural love and fatherly affection to his second son, and for his better advancement, livelihood, and maintenance, covenanted to stand seised to the use of himself for life, then, of his second son, his executors, &c. for 99 years, if his said son or any woman he should marry, or any issue of his body should so long live, paying yearly unto the heirs and assigns of the father the yearly rent of 4*l.* payable quarterly: with covenants on the part of the son, to pay the rent and repair the premises.

The question on this case was, whether a covenant to stand seised could be considered as an evidence of the usual manner of demising? *Et per curiam*, it should. There was no doubt but that these lands had been

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usually

usually leased for lives, and the usual profits made by fines. A covenant to stand seised, entered into by the owner of an estate, *was a lease*, and the objection that the covenant to stand seised in question, was by way of provision for a younger child, was of no weight, for that was every days experience : nothing being so common as making those leases for the benefit of younger children.

Under a power to lease lands generally, provided that such rent or more be reserved upon every lease as hath been reserved or paid for it within a given time previous to the creation of the power, lands not before in lease may be demised ; for where a qualification is annexed to a power of leasing, which, if observed, goes in destruction of the power, the law will dispense with such qualification.

Cumber-
ford's Case,
2 Roll. Abr.
262. 15.
cited 3 Keb.
544. 596.
more at
length.

As, where a conveyance was made of divers manors, messuages, rents, services, and premises, to the use of *I. S.* for life, &c., with *power* to make leases of the premises, or any part or parcel thereof for three lives, or years determinable upon lives, so that *such rent or more* be reserved upon every lease, as was reserved or paid for that within two years then

then next before. Some part of the premises consisted of woods that had not been *before leased* at any rent within *the two years*; he may by force of such power make leases of that part, reserving such rent as he pleases; because it appears, by the *generality* of the words, that it was intended that he should have power to lease all the land. And the restrictive clause was meant to apply, *only* to such lands as had been demised two years before.

So, where an estate which consisted of lands and a rectory, &c., was conveyed to the use of one for life, &c., with a power to let the *premises, or any part of them*, so as such a rent of 5s. was reserved *for every acre of land*. The tenant for life demised the rectory, reserving a rent, which rectory consisted of tythes *only*, and whether this was within the power, was the question? It was argued, that this lease was not warranted by the power; for a construction was to be made upon the whole clause, and the latter words that appointed the reservation of the rent, should explain the former, and restrain the general word premises to lands *only*, or things out of which rent might issue, which it could not out of tithes; for if it should be extended further, the settlement (which

Walker v.
Wakeman,
1 Vent. 294.
S. C. 2 Lev.
150. 3 Keb.
544. 547.
586. 595.

Supra.

was in consideration of a marriage portion) was of no effect for the rectory : as in case it should be demised, reserving no rent, which it might be if not restrained to the latter words, they applying only to the lands. At first, *Hale* thought this case distinguishable from *Cumberford's* ; because this was reserving 5s. an acre, and *therefore*, must be intended to relate to such things as consisted of acres. But, after several arguments, it was resolved by the court, that the lease of the rectory was good ; for this power was *general* and *enabling*, and the last clause being affirmative, though restrictive, would restrain the generality of the former ones. Therefore, here the power must be construed to be to let the premises, that *consisted* of acres at 5s. *per* acre, but of what were not in acres, no rent need be reserved.

3 Keb. 597, And, in the preceding case, it was said by *Hale*, that if the power had been, to let the manor and rectory, expressly reserving 5s. *per* acre, here, the lease would have been good of the rectory without rent.

Supra.

And, agreeable to this decision, it was held by *Holt*. C. Just. in the case of *Winter v. Loveday*, that the rents and services of the manor might be demised *within the power*

notwithstanding that one qualification annexed to the exercise of it was, *that the ancient rent should be reserved*, and no reservation of rent could be upon a lease of rents and services, out of which no rents issued. Yet the rents and services he thought might be demised within this power; for it appeared, that part of the manor was intended to be comprized within this power, but the demesne lands were not to be comprized, then, the rents and services must; for the whole of the manor consisted of demesnes, rents, and services. And if a man had a power reserved to him of making leases of two things, and a qualification was annexed to the power, which could not extend to one of these things, he might make a lease of that thing without any regard to the qualification.

So, in the case of *Goodtitle v. Funian*, part Supra.
of the premises in the lease consisted of manors and manerial rights which had never been let before, and also of a fishery that had been let before, but was not at the time of the settlement. Since that time it had been again let at 15 s. And it was objected that the manors and fishery were not demisable under the power. And it was contended, that with regard to the manors and

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fishery,

fishery, the power could not be extended to them. The manors had never been let; the fishery was not let at the time of the settlement, and the power required the rent then paid or *more*, to be reserved. Things then for which *no* rent was *then* paid could not be meant to be comprehended. This would avoid the whole lease; for one entire rent was reserved, and it could not be apportioned. *Sed per curiam*, the power was express to demise the manors and fisheries. They were particularly mentioned in the settlement, and the power went to the whole. They paid under this lease as great a yearly rent as at the time of the settlement, for they paid nothing then: the words therefore were complied with, and this objection could only stand upon the intent. But the court thought no such intent appeared, the manors were nominally of no value; no object of yearly income. The fishery only worth 15s. a year. They were convenient to the lessee living upon the land, and of no use to the remainder-man. The intent was to give leave to demise all, reserving as much rent in the whole, as had been paid before. And in fact 30l. more had been reserved.

But

But every power, in the construction of it, is to be taken with such a restriction, that the estate itself which is subjected to the power, shall not be destroyed by the exercise of it. And therefore *Rokeby* held, in the case of *Winter v. Loveday*, that in that case there would have been a restraint, by implication, from making leases of customary land held of the manor, had the express words used in that case, *viz.* "so as it be not of the demesne lands been left out;" for if the customary lands might be demised, the manor would be destroyed, which it must be presumed was not the intent of the parties.

Supra.

But if the power to lease be *special* and not general, a lease made under it would be void, if it include therein lands or premises, not having the *precise* qualifications that the power requires.

Thus, where the moiety of a manor was entailed *by act of parliament* made *Anno 27 Hen. 8.* to *Anne*, wife of *John Lord Mountjoy*, remainder to *John Pawlett* and *Elizabeth* his wife, and their heirs of their two bodies, remainder over; in which act of parliament there was this clause; namely, "be it enacted that neither the said tenant in tail,

Mountjoy's Case, Moore 197. S. C. 5 Rep. 3. Et vid. supra.

Tristram v. Baltinglas upon the special penning of the proviso.

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" nor

“ nor those in remainder, nor any of them,
 “ nor their heirs, shall hereafter alien, bar-
 “ gain, give or sell *any* of the *said* premises,
 “ or *any part* thereof, but only for the join-
 “ ture of any wife or wives, or for term of
 “ life or lives of any husband that should
 “ marry any of the heirs, that should be in-
 “ heritable to any of the *said* lands, &c., or
 “ for term of life of any person, or for years,
 “ or at will after custom of the manor,
 “ yielding *the true and ancient rent of the said*
 “ *lands and tenements so to them letten as afore-*
 “ *said*; but that *all* and *every* other act and
 “ acts hereafter done or suffered *contrary to*
 “ *the true intent of the present act*, should be
 “ void and of none effect in law.” The manor
 consisted of free rents amounting to seven
 pounds, and of fifteen copyhold tenements
 which were held for lives, the customary
 rent of which was three pounds, and of
 demesnes which had been usually demised
 by indenture for the several rents and farms
 of seven pounds, &c.; *and there was one*
acre of waste, parcel of the said manor, in
which were always highways and commons
for the tenants, of the yearly value of twelve-
pence. And on the death of every copy-
 holder, the lord, by custom, was entitled to
 an heriot: And there was a Court Baron
 incident to the manor; and the free rents
 or

or copyhold rents, or heriots, or perquisites of court or leet, never had been demised for life, or years, or otherwise. After this settlement made, Lord *Mountjoy* died, and then *Anne*, his wife, did accept a fine of a stranger *sur cognizance de droit come ceo, &c.*, of the said moiety of the manor with the appurtenances, and of a great number of acres which did comprehend the demesnes; by which fine, *Anne* did grant and render the moiety of the said manor, &c., with the appurtenances, for three hundred years, rendering rent, amounting to the free rents, the copyhold rents, and 18*s.* more, and *twelve-pence for the acre of waste*, to be paid at two feasts of the year. Afterwards *Anne* died, and then it became a question between the lessee and remainder-man, whether inserting in the lease the acre of waste, the profits of courts, heriots, rents, and services of free tenants, that had never been before demised, rendered it void? And it was resolved that it did, for the words in the statute, "*yielding the true and ancient rent of the lands and tenements so to them letten as is aforesaid,*" rendered it necessary, that the thing which was demised, should have been in lease before the making of the statute, and that rents should have been reserved thereupon, which there had not been in this case;

case; for it appeared that, *by the name of the manor*, "*waste ground*," profits of courts, &c. had been demised, that never were in demise before, and for which no rent had ever been reserved to the lord of the manor; for which reason there was *not* any *true* and *ancient* rent of those, and by consequence, the true and ancient rent could not be reserved; and *then* the demise thereof was void by the statute.

Bagot v.
Oughton,
Fortescue
332. 8 Mod.
249.

And a power may be by inference taken to be special, and exclusive of a particular part, from the nature of the power compared with that of the property subjected to it. As in the case of *Bagot v. Oughton*. That was a family settlement, with a power of leasing, reserving the ancient rent. And the question was, whether some ground *always occupied* with the family seat might be demised by virtue of the power; and it was held, it might not; for, in such case, the qualification annexed to the power of leasing, "*that the ancient rent must be reserved*," manifestly excluded the Mansion House and lands about it, *never let*. No man could intend to authorize a tenant for life to deprive the representative of the family of the use of the Mansion House; therefore the words, in such a case, shew that the power
was

was meant to extend only to what had been usually let. By that means, the heir enjoys all the premises in the settlement, just as they were held and enjoyed by his ancestor, the tenant for life. He has the occupation of what was always occupied, and the rent of what was always let. *The nature of the thing, therefore, in such case, speaks the intent, as forcibly as the most direct words could have done.*

Fourthly, As to the quality of the interest to be demised, and the quantity thereof.

If a power in a settlement be limited *indefinitely* to make leases, without mentioning the nature of the interest meant to be demised, it shall be taken *strictly* against the donee of the power; and, consequently, be intended to authorize only a lease in possession, and not a lease in reversion.

Thus, where land was assured by act of parliament by the Earl of *Suffex* to his wife for her jointure, the reversion in fee to the earl, with a proviso for the earl to make leases for twenty-one years rendering the ancient rent, &c. and, afterwards, within a year before the first lease ended, made another lease to the lessee by indenture, bearing date
the

Countess of
Suffex v.
Wroth. Cro.
Eliz. 5. S. C.
3 Leon. 130.
1 Leon. 35.
4 Leon. 61.
6 Rep. 33.

the 30th of *March*, for one and twenty years, *to commence at Michaelmas following*. The question hereupon was, whether this lease was warranted by the power? And it was adjudged that it was not; because, for the time, it was a lease in reversion: and if his lordship might make a lease to commence *at Michaelmas following*, he might make it to commence twenty years after, and the settlement intended not to give him that liberty. And it being a *liberty* and *power*, it must be strictly pursued.

Shecomb v.
Hawkins,
Yelverton
222. S. C.
1 Brownl.
148.

So, where *L.*, tenant in fee of the manor of *D.*, levied a fine thereof to the use of herself for life, and after to the use of her eldest son in tail, reserving to herself power to make leases at any time for twenty-one years, or for three lives, rendering, &c. *L.* leased part of the premises to *B.* for twenty-one years, and, before that lease expired, made another lease to *B.* for twenty-one years, *to begin after the determination* of the former lease, and died. The first lease expired. And then a question arose between the son of *L.* and the lessee, whether this were a good lease under the power? and it was adjudged that it was not; for upon such power she could not make a lease to commence at a day to come, but was confined

fin'd to a lease in possession, and could not convey *an interest* to commence *in futuro* in reversion after another estate expired: but the law would adjudge upon a *general* power to make leases, *without saying more*, that they ought to be leases in possession; for, if upon such power a lease might be made upon a lease, she might, by making infinite leases, detain those in remainder out of possession for ever; which would be contrary to the intent of the parties and against reason. And the court said that it had been adjudged accordingly in the case of the Countess of *Suffex*. Supra.

I have stated the observations of the court in the preceding case at length, as reported in *Yelverton* and *Brownlow*, because the same case is reported *Croke, Jac.* 318, as being the case of a power reserved over a reversionary interest; it being there stated that the premises were under lease at the time of the settlement; and that the lease made by her was after the settlement, and previous to the expiration of the subsisting lease, *to commence after that determined*. And to that purpose it was cited in the subsequent case of *Baynes v. Belson*. But both the arguments used in the cases as stated in *Yelverton* and *Brownlow*,

low, and the case of *Lepur* and *Wrotb*, stated in all the reporters to have been cited and relied upon as a precedent in this case, seem to me to warrant us to conclude that *Croke*, notwithstanding his usual accuracy, has certainly mistaken the facts of this case.

Whitlock's
case, 8 Rep.
69.

If a power *expressly* enable one to make leases in reversion, such a lease will be good by virtue thereof. As where *W.*, seised of certain hereditaments in fee, demised the same to one for life (by force whereof he was seised for life, the reversion expectant to the said *W.*) by deed, in consideration of a marriage to be had between his son and *M.*, covenanted and agreed to assure and convey the premises aforesaid to trustees, to the use of the said *W.* and his heirs until the marriage took place, and, after the marriage, to the use of the said *W.* for life, with remainder to his son in tail. And by the said deed it was *provided* and *agreed*, that it should be lawful for the said *W.*, at any time afterwards, to make a lease or leases as well *in possession as in reversion* of the said premises or any part of them; provided always that the said lease or leases should not exceed the number of three lives at most, or one and twenty years, and so that upon every such lease and leases, the best ancient
and

and accustomed rent, heriot, and service, or more, should be rendered and reserved payable during the said lease or leases: and, that the said trustees should stand seised to the use of every such tenant, &c. The marriage took place; and afterwards *W.* levied a fine of the said premises according to the said indenture to the uses therein contained. Then *W.*, being seised of the reversion for his life, with remainder over, according to the said indentures, demised the said premises among others to *H.* to have and occupy to the said *H.* and his assigns for the term of ninety-nine years fully to be compleat and ended, if the said *H.* and *R.* or either of them should happen so long to live: *The said term to commence after the death of, or determination of the estate of, the said B. rendering, &c.* And this was held to be a good lease under the power.

And if a settlement be made of lands that are in lease *previous thereto*, with a power for tenant for life of the reversion to make leases, &c. (*not specifying that they may be in reversion,*) yet a lease to commence from the determination of such prior lease, will be authorized thereby.

Thus,

Marquis of
Northamp-
ton's case,
Dyer, 357, a,
Pl. 43. S. C.
2 Roll. Abr.
261. 8.
3 Leon. 71.
1 Keb. 912.

Thus, where husband and wife, tenants in tail, by deed indented, dated *December*, 32 *Hen. 8.* made a lease of certain parcels of the inheritance of the wife *for a term of twenty-one years*, rendering to them and to the heirs of the wife the accustomed rent. Afterwards, *viz.* 35 *Hen. 8.* it was enacted by parliament, that the husband should have and enjoy the lands in lease, and the rent to himself only for term of his life, the remainder to his wife; and that all leases and grants made thereof, or to be made by the husband by indenture for term of three lives, or one life, or less, reserving the accustomed rent to him for term of his life, and after his decease to his wife and her heirs, should be good and effectual during such term or terms. The husband afterwards, eight years before the first lease expired, (reciting the former lease) demised, and granted the said land by indenture for twenty-one years, next after the end of the first twenty-one years, reserving the said usual rent: The question was, whether this lease were good after the decease of the husband and wife? It was contended, that this depended upon the meaning of the makers of the statute, whether he might make any lease or leases in reversion, or not; because no restraint of leases in reversion was in the act,

as there was in the act of the 32 *Hen.* 8. c. 28. And *Manwood* and *Dyer* held the lease to be good, and warranted by the act: but *Mounson* was of a contrary opinion.

In the report of the foregoing case, 3 *Leonard* 71, the fact of the premises being in lease previous to the making the act of parliament there mentioned, is omitted; and the case is reported as if the marquis had made a lease for twenty-one years under the statute, and then, before that expired, made another lease to commence from the expiration of the former, the power to lease in the statute is also stated to have been made for twenty-one years, or less. But that report seems to be very imperfect, particularly as to the former fact; as *Popham*, attorney-general, in citing this case, on his argument on that of *Lepur v. Wroth*, 1 *Leon.* 35. particularly rests upon the circumstance, that the lease in Lord *Northampton's* case was allowed to be good and warranted by the statute of 35 *Hen.* 8., *because that the first lease, which was in esse when the second was made, was not made by force of the said act:* and he observes that if the former lease had been made by virtue of the said statute, the second lease had been utterly void. And,

2 *Roll. Abr.* 261. 8. this case is stated agreeable to *Dyer's* report of it, and as argued by *Popham*.

Earl of Coventry v. Lady Coventry,
Comyns 312.

So, where tenant for life of the reversion of lands that were in lease for lives, by virtue of a power under a settlement, (*providing* “ that it should be lawful for every
“ person, who should be actually seised of the
“ freehold of the premises limited in use, to
“ make leases of any part thereof which had
“ been usually letten for lives or years, of
“ which he should be so actually seised by
“ virtue of the limitations aforesaid, by indenture, for any term not exceeding
“ twenty-one years, or determinable on one,
“ two, or three lives, &c. So, as there were
“ not in any part of the premises so leased
“ at any one time any more or greater estate
“ or estates than for twenty-one years, or
“ for three lives, or for any number of years
“ determinable upon three lives”) made several leases for ninety-nine years, to commence from the death of a remaining life in a former lease. And the question was, if this lease was pursuant to the power? It was objected that it was a lease in reversion. But it was answered that, when a man made a settlement of *the reversion* of lands *demised* for life or years, to the use of one for life, with

with power to make leases generally, he might make a lease *during the continuance* of a former lease, to *commence* after the former; as *otherwise* his power would be ineffectual.

However, in the following case, the court seem to have been of a contrary opinion. There C., in consideration of a marriage and a portion, and for the affection he bore to his relations, covenanted to stand seised of the estate in question to the use of himself for life, remainder in strict settlement, with remainder over; with power for C. to make leases to any persons for one, two, or three lives, or for one and twenty years, reserving the ancient rent. C. afterwards demised the premises to B. for one and twenty years, to commence after the death of J. and M., who were tenants for lives, at the time of making the settlement, and who lived several years after. One question was, whether C. had pursued the power in making a lease to commence *in futuro*? And it was held that, as to this point, the power was not well executed, the lease being to commence *in futuro*.

Baynes v.
Belfon,
T. Raym.
247.

But, the preceding case did *not* receive a decision, but was adjourned; other questions arising therein. And it is observable,

Vid. supra.

that the court is stated by the reporter, to have founded their resolution on this point, in the case of *Shelcomb v. Hawkins*, as reported, *Yelv.* 222, and on that of *Suffex v. Wroth*, as cited 2 *Roll. Abr.* 261. and 6 *Rep.* 33. both of which cases, as cited in the reporters referred to, apply only where reversionary leases are made, under powers *attaching* upon estates *in possession*.

Opey v.
Thomafius,
1 Lev. 167.
1 Keb. 778.
911.
T. Raym.
132.
Siderfin 260.

But, the better opinion seems to be, that if, in such case of a settlement of reversionary premises, the power be *expressly* to lease *in possession*, a lease *in reversion* will not be warranted thereby. As where a father and son seised in fee made a lease for ninety-nine years, if three persons or either of them lived so long; and afterwards by indenture they covenanted to levy a fine of the reversion to the use of the father for life, remainder to the son for life, remainder over in tail, with a *proviso* that it should be lawful for the father, or any of the remainder-men, to make leases for ninety-nine years or three lives *in possession*; or for two lives *in possession* and one in reversion, or for one life *in possession*, and two in reversion. The father, *during the continuance of the first lease*, made a lease for life to T. And the question was, whether the latter lease, being made whilst the

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the lives in the former lease were in being, was authorized by the power? The case was first argued in *Mich.* term, 16 *Car.* 2. and afterwards in *Trin.* term, 17 *Car.* And, on this argument, *Keeling* seems to have been inclined to support the lease, but *Twysden* spoke not to this point, and it was again adjourned. And then it seems to have been again argued, *Trin.* 18 *Car.* And it was then said that the lease was not pursuant to the power; for that was to make leases in *possession*, and the possession was demised before by the first lease; and so this was but a lease in reversion. But, on the other side, it was contended, that if the settlement had been of lands in possession, then without doubt the power could not extend to make a lease in reversion. But here the settlement being of a reversion, the power ought to be taken to make leases in possession *in presenti* of the reversion; for it could not be supposed, that the tenant for life was to expect to make a lease for life, after three lives ended, that probably would survive his own. And *Keeling* inclined that the lease was within the power, for that the settlement being of a reversion, a present lease of a reversion was within it: besides, he said this power arose out of the settlement which was intended to have some effect. *Wyndbam* and

Twysden held that had the words *in possession* been left out, and the words of the power been *generally* to make leases, the case had been strong in favor of the lease, the settlement being of a reversion. But the power being *expressly* to make leases *in possession*, the lease *in reversion* was *not* within it: and they both observed the particular wording of the power to make leases, namely “for two lives in possession, and one in reversion,” or “one in possession and two in reversion,” so that it appeared that the *scope* and *intent* was, *never to have an estate above three lives, in being at one time.*

A lease may be considered, in law, as *in reversion*, in several senses, or views of it.

Per Holt,
C. J.
Comyns 39,
et vid. Car-
ter 14, per
Bridgman.

In the largest sense of that term, that is said to be a lease in reversion, which hath its commencement *at a future day*; and then it is opposed to a lease in possession; for, every lease that is not a lease in possession, in this sense is said to be a lease in reversion.

Ibid.

In a more confined sense of the term, it signifies a lease to begin *from* and *after* the *end* of a present interest in being, in which sense all leases, where there is a particular estate out, are leases in reversion: and so is the term reversion to be taken, where men-
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tion is *generally* made of leases in reversion under a power.

As where *P.*, seised of the manor of *M.*, settled the same on the marriage of his son, to the use of himself for life, remainder to his wife for life, remainder to his son in tail : with a proviso that he, during his life, and his wife, if she survived him, should have power after his decease, during her life to demise the premises *in possession* for one, two, or three lives, or for thirty years, or any other number of years determinable on one, two, or three lives ; or, *in reversion*, for one, two, or three lives, or for thirty years, or for any number of years determinable on one, two, or three lives, so as such demise were out of the ancient demesne lands, parcel of the premises, or any of the other lands, used or reputed demesne lands, within seven years before the settlement, and so as the ancient rent were reserved, &c. *P.*, reciting that *R. B.* and his wife held a copyhold tenement for three lives, demised the *said* copyhold tenement to *R. B. habendum* for thirty years, *to begin after the death, surrender, or forfeiture* of the estate of *R. B.* and his wife : and, the question being, whether this lease was pursuant to, and warranted by the power ? One point decided was, that this

Winter v.
Loveday,
Comyns 37.
S. C. Salk.
537.
1 L. Raym.
267.
Ca. T. Holt
415.

lease, as a lease in reversion, was within the power; for that when *mention* is made of leases in reversion *in a power*, it shall be taken *in the strictest sense* thereof, and intended of leases to commence after the end of a present interest in being; as, if it were taken in the other sense, namely, as authorizing a lease to commence *at a future day*, a tenant for life might then make leases to commence forty years afterwards, which would be contrary to the reason of the thing.

Whitlock's
case, 8 Co.
70, b. per
Holt.
Comyns 39.
1 L. Raym.
269.

But this expression, "to lease in reversion," in *its narrowest sense*, hath still a different signification from either of the above; as if it be applied in a power to the making a lease for one or two lives *in reversion*; for a lease for lives cannot be made in reversion: in such case therefore it will be intended of a concurrent lease, or a lease of the reversion; namely, a lease of that land which is, at the same time, under a demise; and then it is not to commence *after the end of the demise*, but hath a present commencement, and is concurrent with the prior demise.

Supra, et per
Holt. Co-
myns 39.

And, in this respect, the *very same* words in the same *identical* power may have different significations when applied to different subjects. Thus it was held, in the case of

Winter

Winter v. Loveday, that the words, "to demise the premises in reversion," had a different sense when applied to the term, "for one, two, or three lives" from that which they had when applied to the term "for thirty years, or any other number of years determinable upon one, two, or three lives;" for, in the former case, *viz.* the lease for lives within the power, it must be intended of a lease *of the reversion*, or a *concurrent lease* of that land which is at the same time under a demise, and as having a *present commencement*, and not of a lease *in futuro*, to take effect *after* the determination of a lease in being.

If there be a power to make leases *in possession* expressly, which attaches upon an estate, part of which is in possession, and other part thereof in reversion at the creation of the power; the donee of the power may *immediately* make leases *in possession* of the estate in reversion as well as of that in possession.

Thus, where a man seised in fee of the reversion of divers lands, and in his demesne as of fee in other lands, levied a fine of all his lands to the use of *I. S.* for fifteen years, and afterwards to the use of himself for life,

with

Fox v. Prickwood,
2 Bulst. 216.
S. C. 1 Roll.
Rep. 12.
Cro. Ja. 349.
2 Roll. Abr.
260.

with a power, by a proviso therein, to himself to make leases for twenty-one years or three lives *in possession* reserving the ancient rent. The question was, whether by this power he might make leases of the lands comprised in the first lease, during the continuance of the first lease for fifteen years or not, or not until after the same ended? The court were clearly of opinion, that he might well make leases thereof *presently* in possession, by this power; for by intendment of law, the last lease arose by relation out of the *fine, ab initio*; and therefore, it was as if it had been limited by the fine to the last lessee at first with remainder over: and that the first lessee should have the rent reserved during the fifteen years limited to him, and that this was a present power reserved unto the tenant for life, and he was not to stay the execution thereof until the remainder came into his possession.

1 Roll. Rep.
12.

It appears from the report of the foregoing case, by *Rolle*, that *Coke* did not, in giving his judgment thereon, insist upon the word *possession*: but *G. Crooke* urged, that it was limited, "that he might lease *in possession*," and that *that* extended only to lands *then* in *possession*, and not to those *then* in *reversion*, and then that those of which this lease was made were
lands

lands *then* in *reversion*. But Coke said, that it was intended that he might lease in possession; for that the word "*possession*," was to be referred to the lease, and not to the land.

But it seems, that if a power enable any one to make leases in reversion as well as in possession; and some part of the land subject to the power be in possession, and other part of it in reversion, he cannot make a lease in possession, and another lease in reversion of the same land; but his power to make leases in reversion will be confined to such land as was not *then* in possession. So note the distinction where the power is to lease *in reversion* as well as *in possession* lands part in reversion and part in possession; and when the power is to lease *in possession* lands part in reversion and part in possession.

Per Holt. C.
J. Comyns
39,

And if one, having power to make leases *generally*, or in possession, lease pursuant to the power reserving, &c.: he may make a second lease at any time subsequent and before the former lease expires, provided it be limited to commence in *præsenti*.

Thus it was adjudged in the common pleas, that if a man hath power to make a lease for years, and he make a lease to com-

Berry v. Rich.
cited Hard.
412. and not
denied.

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mence *in presenti*, when there is another lease in being, the power is well executed, and the second lease shall continue as long as it may, *taking effect in interest and possession* after the determination of the first lease.

Read v.
Nath. 1 Leon.
137. et vid.
Fox v. Collier
cited 1 Leon.
36. reported
1 Anders.
65.

So, where one, seised in fee of certain hereditaments in question, devised the same to his son for life, remainder over, with a proviso, that if his son made any alienation or discontinuance whereby the premises could not remain, descend, and go in the form as appointed by the said will, otherwise than by lease for twenty-one years, whereupon the old and accustomed rent should be reserved, that *then* such person should forfeit his estate. The son afterwards, in 4 *Mariae*, leased to *B.* for twenty-one years, rendering the ancient rent; and *then* 18 *Eliz.* leased unto *R.* and his wife for one and twenty years, to *begin presently* (which was one year before the expiration of the lease made to *B.*), which lease being expired, *R.* entered. And the question was, whether the last lease, though to begin from the date of it, being made a year before the former expired, was authorized by the power? And it was moved, that although by this authority, he could not make leases in reversion; for then he might charge the inheritance in infinitum;

finitum; yet such a lease as this he might make well enough; for this lease was to begin presently, and so was no charge to him in reversion, for the inheritance was not charged *in the whole* for more than one and twenty years. And the court seem to have been of this opinion, for the reporter states nothing as to the event of this case.

So, where Lord *Ferrers* was tenant for life under a settlement in which there was the following power, *viz.*: “ That it should be lawful for the tenants for life, *respectively*, from time to time, and all times during their respective natural lives, and when they should respectively come into *and be in actual possession* of the premises settled, by indentures under their hands and seals, to demise all or any of the said premises, or any part thereof, to any person or persons whomsoever, in possession, but not by way of reversion or future interest for the time of twenty-one years absolute, or any lesser absolute term, or for any term or number of years determinable upon one, two, or three lives; so as upon every such lease and leases respectively, there were reserved and made payable during the continuance of any such lease or leases respectively, to be incident to and go along with the immediate reversion or remainder
of

Goodtitle,
Lessee of
Clarges, Lord
Ferrers v.
Funican,
Dougl. 565.

of the premises so leased, so much, or as great, yearly rents as, or more *than there* was, or were paid, or yielded, or agreed to be paid, and yielded for the same, or *proportionally* for any part thereof. Part of the premises subject to the power were let by the agent for tenant for life, by agreement in writing, from the 15th of *March*, 1775, to occupy till the 10th of *March*, 1776, to three persons, and the rest was at the time of the lease in the occupation of tenants at will. Afterwards, on the 17th of *August*, 1776, Lord *Ferrers*, by indenture, reciting the power, demised part of the premises to Mrs. *Funican* for 99 years, from *Lady Day* then last past, if she should so long live, at the yearly rent of, £c. It was objected to this lease, upon motion for a new trial, (the lessee having got a verdict in ejectment brought by the remainder-man to recover the premises leased,) that it was *a lease in reversion*, and therefore, contrary to the power and void; for it was contended, that Lord *Ferrers*, at the time of this demise, could not grant an immediate lease in possession, because part of the premises were then let, under an express agreement, for a term, of which several months were then to run; and though the rest was stated to have been in the hands of tenants at will, yet, as
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the law then stood, they must be considered as tenants from year to year, and intitled to six months notice. Lord *Ferrers*, it was said, could not have brought an ejectment against any of them, at the time of the demise, and therefore had no immediate possessory right. Such right, and the rights to recover in ejectment, being convertible. It made no difference to this question, that the subsisting leases were not by deed, since a parol lease for three years, or less, was equally effectual with a lease by indenture, and the court could not draw the line, and say, that a lease granted under a power like the present, should be *good*, although there was a subsisting term *for seven months* at the time of granting, but should be *void* if there was a subsisting term *for seven years*. The legislature only, or the parties could draw such a line. That Sir *Orlando Bridgman*, the father of conveyancers, and who probably invented these powers, laid it down, that all leases, where there was a particular estate out, were leases in reversion. And that the interposition of the legislature in 4 *Geo. 2. c. 28. §. 6.* to enable landlords to renew leases for lives, on the surrender of the former leases, although the under-tenants should not likewise surrender, corroborated this doctrine.

But it was answered by the other side ; First, That the tenants assented to this lease, and surrendered their possession before the execution of it, in order to make it valid. This was expressly left by the judge to the jury, who found that the defendant was in possession at the time of the execution. Secondly, That if the jury had not found the lessee to have been in possession, *still this would be good as a concurrent lease* ; for this *Read v. Nash* was cited, and the reason there given for supporting the lease, was said to be a strong one ; namely, that the inheritance was not charged, in the whole, with more than twenty-one years. No authority, it was said, had been cited against this case, nor any answer given to the reasoning in it. Thirdly, That, in respect of the power, all the subsisting leases were leases at will, there was no outstanding lease as against the remainder-man ; he would not have been bound to give the tenants notice to quit, but might have entered upon them immediately ; for, except in the case of leases under the power, (and these were not in many respects according to it), the possession would devolve upon him the instant of the death of the tenant for life. And, for these reasons, the court unanimously held

held the lease to be good, notwithstanding this objection.

We have already observed, that an interest is, in law, said to be in reversion, when its commencement is limited at a future time, in which sense it is opposed to an interest in possession, which must exist at the present time. It follows, therefore, that possessory and reversionary relate to time, and that every *subsisting* interest, in a thing which is not in possession, must be in reversion; for possession, and reversion are synonymous to present, and future; and in that view, whatever interest is *not present*, must be *future*.

Now, time is divided into different lengths; as instants, seconds, minutes, hours, days, weeks, months, years, centuries, &c. Each of these larger portions, contains in itself a certain number of the smaller. Thus a century, contains in itself a certain number of years; a year, a certain number of months; a month, a certain number of weeks; and so on, down to the smallest particle of time, that we can entertain an idea of. So, that the smallest particle of time is only a subdivision of the modification, that comes next in gradation upwards. Now therefore, as an instant, is the smallest part

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of time that we are sensible of, every other combination of instants must determine by the conclusion of an instant; and every successive modification must commence by the inception of an instant; and, *consequently*, a day must end by the conclusion of an instant, and a new day must begin by the inception of another instant. Now one instant is as distinct from another, as one century is from another century; therefore, any event that is to happen next instant, is not an event happening this instant; for the present is not the next instant, nor is the next the present instant. Neither is the beginning of the next, the ending of this instant, nor the end of this instant, the beginning of the next.

The law, therefore, which is founded on reason, and common sense, considers *possessory* and *reversionary* according to the natural and ordinary import of those terms, (without annexing any artificial idea to them), as including the simple ideas of time present and time to come; and, *consequently*, that every subsisting interest or time not present, is an interest or time to come. Upon this principle, it is held, that a lease made to day, to commence to-morrow, is a reversionary lease; for, to-day and to-morrow
are

are two distinct portions of time, and that which, by *its creation*, cannot be in *esse* until to-morrow, is not in *esse* to-day; because to-morrow is not the end of to-day, nor is the end of to-day the beginning of to-morrow. It is *therefore* held, that a lease to begin "from to-day" is reversionary; because it is a lease to begin to-morrow; for if it be not to begin but "from to-day," it is not to begin to-day; since, before the time commencing from to-day begins, to-day must end. Thus, it was said, that where there was a power in uses, to make leases not exceeding 99 years, *a tempore confectio*, and a lease made for 50 years, *a die confectio*, that this lease was not good by virtue of the power, this lease beginning from the day of the date, and not from the making, as the power required that it should.

Harcourt v. Poole,
34 Eliz. in Com. Ban.
Moore 733.
in notes.

This point was determined on a lease arising out of a power in the case of *Denn*, on the demise of *Warren v. Fearnside*. There, *T.*, seised in fee of the lands in question, by lease and release, in 1678, in consideration of a marriage to be had between her and *W.*, conveyed the same to trustees to the use of herself for life, then to *W.* for life, remainder to the heirs of her body be-

Denn v. Fearnside,
1 Will. 176.

gotten by *W.*, remainder to *W.* in fee ; with power to *W.*, if he survived *T.*, to make leases for twenty-one years or for three lives *in possession*, and not in reversion. The marriage took effect, and they had issue three sons. *W.*, the father, survived his wife, and in 1704, demised the premises in question to one for three lives, *habendum from the day of the date* thereof, at the usual rent, &c. which lease had all the *formal* circumstances required by the power. And the question material to this point was, whether this lease was warranted by the power? And it was resolved by the court *unanimously*, consisting of Sir John Willes, Sir Thomas Birch, Sir Thomas Abney, and Mr. Justice Burnell, that it was not ; for the demise being *habendum, "from the day of the date :"* the lease was of a freehold to commence *in futuro*, and therefore, void.

Freeman v.
West, 2 Wil-
son 165.

Again, where the Dean and Chapter of *Worcester*, were seised in right of their church of one of the manors of *Charlton*, and, being so seised, by indenture, bearing date the 26th of Nov. 1750, made between the Dean and Chapter of the one part, and one *Vernon* of the other part, for a valuable consideration, granted the said manor, of which the premises in question were part, to the plain-
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tiff's lessor, to hold to him and his heirs from "*the day of the date thereof*," for the lives of three persons under the yearly rents, &c. In this lease power was given by the Dean and Chapter to *their attorney*, to take possession of the premises, and to deliver seisin thereof to the lessee, *according to the tenor, effect, and true meaning of the said lease*: in pursuance of which power, seisin was delivered of the premises by the attorney to the lessee, on the 28th day of *May 1751*. After two arguments at the bar, Lord Chief Justice Pratt, gave the judgment of the court. His lordship said, "*we must not overthrow established principles of law*; that a freehold cannot be conveyed to pass in future, is a certain principle, and was grounded on the feudal law; for if a freehold could pass to commence *in futuro*, there would be an abeyance, and want of a tenant against whom to bring a præcipe; and the law will not suffer the land to be in abeyance a single day if possible to prevent it; for if it might be without a tenant of the freehold for one day, why not for a year, or fifty years. Indeed, at that day, there was not such absolute necessity that there should be an actual tenant of the freehold, as formerly, when real actions were the only way of trying titles to land, and which real writs could only be

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brought

brought against the tenant of the freehold ; because, at that time, and for 200 years before, the fictitious action of ejectment against the tenant in possession was, and had been, the universal practice of trying titles to lands and tenements : and therefore, if ever there were a case, where the *astutia* of judges to overlook niceties in the law, and to get over difficulties of first principles which stood in their way, was commendable, this was that case. The old principle of law, that a freehold could not pass to commence *in futuro*, had no good reason or ground to stand upon at this day, but without saying any thing against that old law, they might, in this particular case, with the authority of their forefathers, determine this to be a good lease.

The objection to it was not much to be favored ; it was to overturn a deed made upon *good consideration*, it would make void a great number of church leases which were penned in the same way, and occasion much inconvenience : *ut res magis valeat quam pereat*, was a ground for them to stand upon, and, therefore, they were of opinion, *that the freehold remained in the Dean and Chapter*, after the date and making of the lease, and until seisin was delivered by the attorney to the

the lessee according to the *tenor*, *effect*, and *true meaning* of the lease ; and *then*, and not before, the *freehold* passed out of the Dean and Chapter to the plaintiff's lessor. The *livery* of *seisin* was the only powerful operative transaction ; for if, in this case, nothing had been said of livery, either in or *dehors* the deed, nothing would have passed by the lease. The court, therefore said, that they *would presume* that the power given to the attorney was to make livery *at any day* subsequent to the lease, which they said was the true meaning of the deed ; for, by the warrant of attorney to deliver seisin in the present case, the intention of the parties was, that the deed should be substantiated by the livery, and, in the mean time, the freehold was in the grantor, so, that without saying any thing against the old law, *that a freehold cannot pass to commence in futuro*, they gave judgment in favor of the lease.

Upon the preceding case, three observations occur, namely, First, That Lord Chief Justice *Pratt's* argument *admits throughout*, that a lease made to hold "*from the day of the date*," supposing it to take effect by virtue of the deed by which it is made *alone*, is, without possibility of dispute or question, a lease "*in reversion*;" for his whole argu-

ment allows that *such a lease*, unaided by *livery*, is a lease to commence *in futuro*. Secondly, That this construction upon the words "from the day of the date," was not a construction put upon those words, or to speak more aptly, upon that phrase, in order to invalidate feoffments, and render them void ; for, in former times, as now, the same disposition, to support the acts of men, pervaded the courts. But the courts *then* held, that whatever disposition they might have to support men's deeds, yet, they were not to *uphold them* by construing their words, in direct opposition to the natural sense of them. They conceived, that words were the prototypes of ideas, and that they were sounds to which men had affixed a certain import, by common consent. They, therefore, understood them according to their usual acceptation, not thinking themselves warranted to affix such ideas to them, *as in their fancy*, would make them best suit the intention of those that used them. Thirdly, That unless that lease could have been aided by the livery, it could not have been supported without overthrowing established principles of law, which it was his lordship's opinion *must not have been* done, let the *consequences* of not doing it, have been how they might.

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The next case that has occurred to me on the subject of a power so circumstanced, is the Countess of *Portland's* case. There, a lease for fifty years had been granted by the crown to the Countess of *Portland*, which, from private motives, Lord *Pembroke*, who was possessed of property adjoining to the premises, subject to the lease, wished to impeach. For this purpose, the attorney general was directed to file an information upon the part of the crown, for the premises under lease, which was accordingly filed in the Exchequer. A variety of objections were made to different flaws supposed to be in the lease, of which the principal one was founded upon the civil list act, 1 *Anne*, *stat.* 1. c. 7. which directed, "that all leases to be granted of any of the crown lands should be void *unless made to commence from the date or making thereof*," whereas this lease was made to commence "from the *day* of the date or making;" and it was contended on the part of the crown, that "from the date," and "from the making," were inclusive, and that the act of parliament had expressly declared that the lease should be in those terms; but, that "from the day of the date," was *exclusive*, and therefore the lease was void for the variance in point of commencement. The lease being a lease

Att. Gen. v.
Countess of
Portland,
cited, Cowp.
723.

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in reversion, when the statute authorized a lease in possession *only*. On the part of the Countess it was contended, that "from the date, and from the day of the date," were both the same. Sir *Thomas Parker* and Mr. Baron *Reynolds* were of opinion with the objection, that it was a void lease; because it commenced *in futuro*. The two other barons were of a different opinion upon this point, but upon another point they were also of opinion, that the lease was void. So, that for different reasons they were all of opinion that the lease was void.

The preceding case is cited from a loose statement, in the case of *Pugh* and the Duke of *Leeds*, which furnishes no account of the grounds, upon which the judges differed upon that part of the case, now under consideration; and although the author has taken considerable pains to obtain a more full account of it, and, with that view, has traced it into private hands, upon application, he found those who were in possession of it were under engagements, not to permit an inspection. But, even in its present obscure state, it furnishes ground to surmise that the judges, who opposed the opinions of Sir *Thomas Parker* and Mr. Justice *Reynolds*, must

must have rested upon the particular penning of the *habendum* there, viz. "from the day of the date *or making*," which furnished ground for arguing that, to support the lease, *et ut res magis valeat quam pereat*, the words, "*day of the date or*" might be considered as surplusage and left out, in which case the lease would correspond with the statute; for, it would then be a lease to commence "from the making." But it seems to be extremely questionable how far a construction, which is so totally repugnant to grammatical accuracy, according to which the proper construction would be from the day of the date, or from the day of the making, which are synonymous, would have been admissible in law.

Again, where B., seised in fee of certain hereditaments, by her will gave and devised the same to her nephew for life, with remainder to his first and other sons in tail male, and the issue male of the body of such sons, and in default of such issue, remainder over. And in the will there was contained the following power, namely, "I do hereby declare, elect, and appoint, that it shall be lawful to and for my said nephews at any time or times, when they shall come into

Doe on the
dem. of
Baynton v.
Watton et
al. Cow-
per 189.

into the actual possession of the said premises hereby by me given to them as aforesaid, by any writing or writings to be subscribed and sealed by any, or either of them, when possessed of the said premises as aforesaid, in the presence of three witnesses at the least, to demise, lease, or grant the said premises, to each of them hereby granted as aforesaid, to any person or persons whatsoever for the term of one and twenty years, or under, or for any number or term of years determinable upon one, two, or three lives, *in possession* and not in reversion." The testatrix died, and *then* the nephew, by indenture executed with the forms that the will required, demised all and singular the premises in question to a lessee, to hold unto the lessee, her executors, &c. "*from the day of the date*" hereof, for and during and unto the full end and term of fourscore and nineteen years, from thence next ensuing, and fully to be compleat, and ended, if three persons therein named, any or either of them, should so long happen to live. The question was, whether this was a good lease under the power?

It was objected, that this lease, being made to commence "*from the day of the date,*" was a lease *in reversion* and not in possession,

possession, and *therefore* not pursuant to the power.

On the other side it was admitted that the authorities were *decisive* in cases of *freehold demises*; but a distinction was attempted to be taken between those, and cases of leases under powers; and a note at the end of the report of *Freeman v. West*, 2 *Wilson* 165, was urged, where it is said that Mr. Justice *Wilmot*, at a former trial in ejectment upon this same lease, was of opinion, that "from the date," and "from the day of the date," was the *very* same, and both included the day. But Lord *Mansfield* said that the note alluded to in *Wilson* must have been mistaken. And Mr. Justice *Ashurst* observed that Mr. Justice *Wilmot*, in the case alluded to, left it to the jury to say, whether they would not presume that *livery of seisin* was made subsequent to the lease. And all the judges were unanimously of opinion that the lease was bad, and that, although it was a very hard case, the authorities were too many to be got over.

Any one who peruses the preceding cases upon this point, (especially the latter in which the court of King's Bench were clear, decided, and *unanimous* in opinion, that the
law

law on this point was settled beyond the possibility of being shaken) would naturally conclude that this *rule* of construction respecting the legal import of the phrase "from the day of the date" in the *habendum* of a deed would have been no more litigated; but that did not happen to be the case; for some loose words thrown out by Lord *Mansfield*, in delivering his opinion thereupon, left a shadow of hope still remaining, sufficiently strong to induce any future claimant under a lease so circumstanced, if any such should arise, to make one other effort to shake this construction of those words, strongly as it seems to be fortified by the preceding adjudications. The expressions I allude to were these. His lordship said, that he applauded Lord Chief Justice *Wilmot*, for leaving it to the jury to presume livery of seisin in the last moment of the day, and that, if the case in question could be determined that way, he certainly should wish for it; but it could not. *If the counsel therefore thought that they could find a contrariety of authorities*, he should be glad to lay hold of it, and bring the matter back to common sense, and the clearest principles of justice. Adding, that the word inclusive or exclusive would be decisive. There it was a question of construction, which word should be implied. However it so happened that

that the counsel, in support of the case then in question, either did not, on search, discover, or presumed, without search, that they could not discover any such contrariety. Nor were the court themselves aware of any such disagreement in the cases. But one man by superior talents, or superior industry frequently discovers what to another man less acute or less laborious, is totally imperceptible. Nay, sometimes the same man is incapable of distinguishing, at one time and in one view, between things, which, at another time, and in a different view of them, affect his senses as *diametrically* opposite to each other. One, or both of these things happened on the present occasion; for, although the court and counsel in the preceding case thought, that the current of decisions was uniformly one way, a case soon arose, in which a different opinion was, for the first time, broached; and in which the court of King's Bench, composed of the same members as it was when the case of *Doe* and *Walton* was decided, discovered, that they had been all in the wrong in their judgment on that case; for, that the point there taken to have been settled by a series of solemn adjudications *uniformly* one way, was so far from being decided that way, that, on the contrary, there were no *two* concurrent judgments

ments upon it. The consequence of which was, that *this court* thought themselves at liberty to decide on the subject, as in their discretions should seem best, under the circumstances of each case as it arose.

The case I allude to is that of *Pugh* and the Duke of *Leeds*, which was decided in the court of King's Bench the 28th of *November*, 1777, about three years after the decision of the case of *Doe v. Walton*.

Pugh v.
Duke of
Leeds, Cow-
per 714.

This was an issue to try, whether a lease made by a tenant for life, to his daughter, by virtue and in pursuance of a power reserved to him under his marriage-settlement, was a good and valid lease. The power reserved was to lease the premises for any term or terms of years, not exceeding twenty-one years *in possession*, and not in reversion, remainder, or expectancy, reserving the best improved rent, &c. The *habendum* of the lease made was in these words: to hold to the said *Elizabeth*, her executors, &c. "from the day of the date" of the said indenture for twenty-one years, &c. On the trial a verdict was found for the plaintiff the husband of the lessee, subject to the opinion of the court upon the following facts; namely, that tenant for life being seised, and in possession,

executed

executed the lease in the issue mentioned; and a counter-part thereof was executed by the lessee; that the rent of 57 *l.* reserved by the lease, was the most and best approved yearly rent, that could be reasonably had for the premises; and, that the lease was in every other respect, made agreeable to the power reserved to the said tenant for life, excepting as to the commencement of the term mentioned in the said lease. Upon which the question submitted to the court was, whether the said lease, being made to commence "from the *day* of the date" thereof, the same was duly executed, according to the terms of the above-mentioned power?

The counsel who argued against the va- Supra.
 lidity of the lease, relied on the authorities
 of *Doe ex dem. Baynton v. Watton*, and of
Doe ex dem. Gearing v. Sbenton, Mich. 16 Geo.
 3. B. R. as decisive of the point. And
 contended that the objection equally applied
 to chattel leases under powers, as to freehold;
 for that in chattel leases the party was bound
 by the power, in freehold, by the law. And,
 if so, this power was ill executed and the
 lease bad; for, it was not to commence un-
 til the day after it was made, and if one day
 might be excepted, twenty, or one hundred,
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might. But the court were *unanimously* of opinion, that the lease was good, and the power well executed.

The ground of this opinion and judgment was, that “from” might, in vulgar use, and *even* in the strictest propriety of language, mean either *inclusive* or *exclusive*. That the parties *necessarily* understood and used it in that sense which made their deed effectual.—That courts of justice were to construe the words of parties, so as to effectuate their deeds and not to destroy them, more especially, where the words themselves abstractedly might admit of either meaning. That, after arranging *all* the cases upon this subject, the authorities appeared to be in an unsettled state, *and were themselves so many contradictions backwards and forwards*.

I propose, in opposition to these grounds, to shew, that the word “*from*,” as well in strict grammatical sense, as in the ordinary import thereof, when referring to a certain point, as *a terminus à quo*, always excludes that point. That if, in vulgar acceptance, it were capable of being taken indifferently, either *inclusively* or *exclusively*, yet, that in law, it has obtained a certain fixed import,
and

and is *always* taken as exclusive of the *terminus a quo*; and, *consequently*, that the *terminus a quo* in this case, being "the *day* of the date," *that day* must be excluded.

If I succeed in either of these objects, it must follow, that the court of King's Bench, upon their own principles, were wrong; for Lord *Mansfield*, in delivering the opinion of the court, rested the validity of that judgment upon these two grounds; First, That the word "from," according to its natural import, may, in a case like the present, be taken indifferently *inclusive* or *exclusive*. Secondly, that the words, "from the day of the date," had, in cases like that under consideration, been adjudged *indifferently* both ways, or, as his lordship was pleased emphatically to say, *that they were themselves so many contradictions backwards and forwards.*"

In the accomplishment of this object, I must bespeak the patience of the reader; for, from the number of authorities extant upon this subject, to which I shall be under the necessity of recurring, to shew what is the precise state of the law upon this subject, and the real grounds upon which all the cases turn, I am afraid I may appear tedious. But, when it is recollected that the same case

may again occur, it being more than probable that many purchasers have laid out their money on estates so circumstanced, under an idea, and with advice, that such leases under powers were void ; and that at all events, this question must perpetually arise in a vast variety of instances, it will not, I trust, be deemed irrelevant to a treatise on this subject to discuss it a little at large ; especially as though, with respect to the cases to which I allude, this decision might, if the principle thereof could apply to them, be conclusive ; yet they, as differing in circumstances, will each of them afford ground of litigation, founded upon the existence of a succession of former authorities diametrically opposite to that now under discussion. But if these grounds were not sufficient to justify this attempt, there is another which I know will insure me the candour and attention of every *English* lawyer, and that is the reflexion that my object is to *rescue* the *venerable* names of a *Coke*, a *Holt*, and a *Hales*, and of *all* those *distinguished* characters, who have been ornaments to our profession for a term of *two hundred* years, from the *severe* censure thrown upon them by the noble lord, who delivered this judgment in *Pugh* and the Duke of *Leeds*, when he affirmed, “ that the authorities down to the
year

year 1743, a period of two hundred years were so many contradictions, *not much to the honor of the learned in Westminster-Hall* to embarrass a point, which a plain man of *common sense*, and *understanding* would have *no difficulty in construing.*"

Those *great* men considered the law of real property in this country, "*as a fine artificial system full of unseen connections and nice dependencies; and that he who broke one link of the chain endangered the dissolution of the whole.*" They therefore had one great object in view. They endeavoured to hand down to posterity that *noble* code of law, of which *they* were the *expounders*, pure and unblemished in all its native beauty, consisting of a regular train of premises and consequences, possessing all the simplicity, and, *in a great degree*, the certainty of mathematical demonstration. They *dreaded* the introduction of a *discretionary* authority, in the court in all cases, as *mischievous* to the suitors, and *big* with inconvenience and difficulty to the judges. They kept in their minds that *admirable* precept laid down in *Calvin's case*, JUDEX BONUS NIHIL EX ARBITRIO SUO FACIAT, NEC PROPOSITO DOMESTICÆ VOLUNTATIS, SED JUXTA LEGES ET JURA PRONUNCIET.

Blackstone's argument in *Perry v. Blake.*

7 Co. 27, a.

But to return to the subject under consideration. Among other arguments used in support of the decision in question, it is said, "that in grammatical strictness, and the nicest propriety that the *English* language admits of, the sense of the word FROM, must always depend upon the context and subject-matter, whether it shall be construed *inclusive*, or *exclusive* of the *terminus a quo*; and that whilst the case was arguing, an hundred instances and more occurred, both in verse and prose where it was used both inclusively and exclusively." In answer to a position so put, and which goes no further than a simple allegation of the fact, it might perhaps be sufficient to put the negative on the point, by averring the contrary proposition. This difficulty would have been avoided had the chief justice thought proper, in this case, to have stated *in terminis*, any one of the hundred instances that occurred to his mind on that occasion. I confess, with great deference to that distinguished character, I am at a loss to find one, where this particle "*from*" is used *with reference to a computation or distance of time*, in which, in grammatical strictness or propriety of language, that is the case. Innumerable instances where the *contrary sense* prevails, press instantly upon the mind; as from *London to Richmond*

Richmond is ten miles, or more pointedly in this description, "his regiment lies half a mile at least, South from the mighty power of the king" in allusion to place.—From twelve to two in allusion to time.—From the fire of *London*, in allusion to a fact, or, more properly, to express a certain time by referring to a certain fact, or "from first to last," in point of ordinary conversation, in allusion to continuance. In each of these phrases, when considered, the word "*from*" will be found to be *exclusive*. For, if a man engaged to go from *London* to *Richmond* in an hour, under a penalty, he clearly would avoid the penalty, if he set off from the Stones end. So, in the other instance, the half mile must be exclusive of the regiment and the king's forces. Again, if a man were bound to be at a certain place to receive a thing tendered from twelve to two, he clearly would have no occasion to be there before twelve. And, if an event were to be ascertained by the number of years at which it happened since the fire of *London*, all time previous to that fire would be excluded. And, although, at the first view of it, the idiomatic expression of, "*from first to last*," seems to include both, yet that may be answered by alledging, that the word "*from*" *here* is not used with reference to a compu-

tation of time or distance, but to denote a succession of events, as in the instance cited by *Johnson* in his dictionary, out of *Burnet*, viz. these motions we must examine, “from first to last,” to find out what was the form of the earth; or from *Addison*, viz. “he bid her from time to time” be comforted.

But this is not only the ordinary signification of the word “*from*,” but also the legal signification of it, and has been so considered for a period of four hundred years: a length of time which, I should apprehend, would be deemed sufficient to settle, beyond dispute, the sense of any term either of art or ordinary converse. For we find in the Year-book, *Easter term*, 40 *Edw.* 3. 18 *b.* that *John Duke of Lancaster*, and *Blanch* his wife had some time before brought a *scire facias* against the Lady *Latimer*, who prayed aid of him in reversion, and afterwards a protection was procured, and the date of the protection was “*septimo die Januarii à septimo die Januarii per unum annum duraturum* ;” and on a question, whether the first day of *January* was included therein, it was held *per Candish*, that the *first day* of *January* was *not* to be accounted within the year. So *Mich.* 21 *Ed.* 4. fol. 37. pl. 2. On the first day of the term several writs
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of adjournment came to the justices of both benches, to adjourn the term until the *utis* of *St. Michael*, and the writ in the Common Pleas was read, in which it was recited; for that the king was gone against his enemies in *Scotland*, and for divers other reasons, *vobis mandamus et cuilibet vestrum quod omnimodo, placita seu querela, brevia et billa, ab octavis Sancti Trinitatis in octavis Sancti Michaelis, et crastino Johannis 15. Trinitatis. 8 Johannis 15. Johannis adjournari facias.* Upon receipt of which writ *Brian* said to *Glenney*, justice of the King's Bench, *Pigot*, *Tremaile*, and others then present, that by this writ they could not adjourn the term until the fourth day, *after* the octave of the term, which was the day, because the writ was *ab octavis*, which excluded the octave, but if the writ had been *in octavis, vel in et ab octavis*; they could then have adjourned the term on that day, *viz.* the third or es-foin-day. And of this opinion were all the judges.

It is likewise said that "if the parties in the case of *Pugh* and the Duke of *Leeds* had added the words "*inclusive*" or "*exclusive*," the matter would have been very clear. If they had said from the day of the date *inclusive*, the term would have commenced immediately;

mediately; if they had said, from the day of the date exclusive, it would have commenced the next day. "It seems that some better authority than bare allegation is necessary to be produced," before it can be admitted that the case would have been altered, had either of these words been added; for if that which I contend for be true, namely, that the word "*from*" *ex vi termini* excludes *the terminus à quo*, I cannot conceive that the addition of the word "*inclusive*" would alter the case, *so as* to give the word "*from*" a different construction from that which it would otherwise receive; because, if the word "*from*," in legal construction, as well as in natural import, be exclusive, the addition of "*inclusive*" cannot alter the sense of the word "*from*:" for "*inclusive*" in that case is repugnant to "*from*;" and then the sentence being completed, and perfected by the word "*from*" the day of the date," the word "*inclusive*" being *incompatible* with what precedes, must be rejected as repugnant. Many instances might be put, in which the law rejects words added after a sentence completed, which are, in their nature, repugnant to what has preceded. Thus, if a man grant rent out of land, *proviso*, that it shall not charge the land. The proviso is void. And if a feoff-

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ment be made upon condition that a man go from *Westminster* to *Rome* in three hours, the condition is void for the impossibility. Now, to apply these instances to the matter in question; a man demises in words which *ex vi termini* constitute a lease *in reversion*, and then adds words, repugnant to those that have preceded, because they make a lease *in possession*; both cannot stand; upon the face of the lease then, some part of it must be rejected; the court *then* having the lease *only* under consideration, would support that part of the *habendum* which was clear and perfect, and reject the additional words, that were repugnant. As a lease to commence “from the day of the date *inclusive*,” it could not take effect: because, “from the day of the date is, *ex vi termini, exclusive*,” and inclusive and exclusive are opposite terms. Thus, upon a question, as to the validity of a lease for lives *habendum*, “*a die datus*,” the jury found a demise made the 10th of *June*, 44 *Eliz.* by indenture of the same date, with letter of attorney to make livery; and that livery was made thereon, the 23d of *July*. It was held by the court unanimously, that it was a demise *at the time of the date*, and that when the jury found that livery was made *afterwards, viz.* the 23d of *July*, this was repugnant and void:
and

Hemmings v.
Paucharden,
Cro. Ja. 153.
infra.

and the lease was held to be bad. And yet if the court could have elected, to reject the date and adhere to the livery, the lease would have been good.

But it may be said, that if part of the words of the lease must be rejected, and by rejecting one part thereof, the instrument will be valid, and by rejecting the other part thereof, the instrument will be void, a court would then consider how they could support the instrument, and would expunge that part of the lease which would prevent it from taking effect. They therefore would consider the word "*day*," in such a case as this, as surplusage, rather than the word "*inclusive*;" admit that it would be so. The argument still holds, that both terms cannot stand together; for if it be admitted, that, "from the day of the date," and "*inclusive*," are irreconcilable, which I contend for, the insertion of, or implying of "*inclusive*" would not have helped the case *in question*, unless "*day*" had also been rejected as surplusage. And to imply one word and reject another, where words in an instrument are sensible and intelligible without so doing, is going rather further in legal refinement, than any case I have yet met with has done.

Other

Other arguments are used upon this occasion, which at first seem plausible, but which appear to me to be equally illusory with those to which I have already attempted to give an answer. It is said, "that the context and subject matter in the case in question shew, that the construction *here* should be *inclusive*, as demonstrably as if "*inclusive*" had been added; for that it was a lease under a power; that the lease *referred* to the power, and the power required that the lease should be a lease in possession." It has been observed, that the addition of the word "*inclusive*," in this case, would not help the lease, without the rejection of the word "*day*;" it has been also submitted, that both cannot be done. It will not therefore be necessary to make any further observations as to that position; and as to arguing from the intention of the donee of the power, it is readily agreed, that no man ever executed a power, without *intending* to do it in a valid manner. But the question for the courts consideration is, is it done in a valid manner? is it executed as the power warrants? for, if it be not, there is another person's intention to be consulted, whose intention must prevail over that of the donee of the power; namely, that of the donor. For such lease is not derived out of the estate
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of the donee, who is but tenant for life, but out of the estate of the donor, by limitation of the proviso in the settlement. Then did the donor intend, that a lease should attach upon his property, not executed according to the power? He certainly did not. It follows, that, as the donee cannot make the lease but *by virtue of the power*, if the lease be not agreeable to the power, it must fail. The court of King's Bench felt the force of this argument, or they would not have resorted to the expedient of imploying the word *inclusive*. But why, as between the lessor and lessee in this case, should any thing be implied that does not *de facto* exist. The power is *merely* a leasing power, created to enable the tenant for life to demise a certain term, upon certain conditions and subject to certain restrictions. One condition is, that no lease shall be granted but in possession. It is *then* the business of the lessee to take care that his lease pursues the power. No argument can be used in his favor against *the donor* of the power, or the *remainder-man*, desirous to enter upon the premises, after the death of the particular tenant, but that the *lease* is *pursuant to the power*. Therefore, in analogy to the language of Lord Mansfield, in *Keech v. Hall*; namely, "that whoever wanted to be secure when

when he took a lease, should enquire after and examine the title deeds." I argue *here*, that the lessee, if he wants to be secure under such a lease, must *inquire* after the power and *see* that it *be pursued*. For if the power be *not* pursued, the remainder-man, or he who is intitled to the estate subjected thereto, has as good a right, nay a *better* right, both in law and *in equity*, to avoid the lease, than the lessee has to uphold it. We are warranted in this position, by the authority of Lord Cowper, in *Orby v. Mobun*, who says, "that the *requisitions* imposed upon the tenant for life in making such a lease being a restraint of the power, must be taken *strictly* against tenant for life, because of the limited acts he is to pursue; and *liberally*, for the remainder-man, because that restraint was intended for his benefit; for, says his lordship, though the power be for the benefit of the tenant for life, yet the restraints are put upon him for the benefit of the remainder-man; and, if the court were to go on both the reasons together, yet it must still be taken for the benefit of him in remainder." And Lord Mansfield laid down the same doctrine in the famous case of *Taylor v. Harde*, 1 Burr. 120. There, his lordship speaks in the following *forcible* manner: "The intent of parties who gave the power, ought

Doug. Rep.
221.

Vid. 3 Ch.
Rep. 73.

ought to govern every construction. He to whom it is given has a right to enjoy the full exercise of it: they, over *whose* estate it is given, have a right to say, "*it shall not be exceeded,*" the condition shall not be evaded, it shall be *strictly* pursued, in *form* and *substance*. And all acts done under a special authority, *not* agreeable thereto, nor warranted thereby *must be void*."

Vid. observations on Sayle v. Freeland, *supra* 150, 151. et Dormer v. Thurland, *supra* 137.

The argument "from the leases referring to the power," appears to me to be equally fallacious; for how can a reference to the power help an act *not warranted* by the power? adjudging from the power and the act, how can they be consolidated?

But, say the court of King's Bench, "the validity of the lease depends upon its being a lease in possession, and it is made as a provision for an only daughter. He must *intend* to make a good lease. The expression then compared with the circumstances, is as strong in respect of what *his intention* was, as if he had said in express words, "I mean it as a lease *in possession*, I mean it should be so construed," if it be so construed, the word "*from*" must be inclusive. It seems too much to say, that a man, in an instrument *strictly* legal and formal, as a deed or lease is, may

may direct how his words should be construed, or *thereby* alter their natural or technical import. Were a man to convey an estate to another for a valuable consideration, by lease and release, and therein limit the estate to the purchaser, "in fee," or "for ever," without inserting the usual formal words, "to him and his heirs," in the limitation, the *res gestæ* compared with the circumstances, would as necessarily infer an intention, in the contracting parties, that one should convey, and the other enjoy the estate, as the *res gestæ* do in this case; and would as strongly prove *the intention* of the parties, as if the releasor had, *in express words*, said, I mean the words "in fee," or the words "for ever," should have the same import, as the words "to him and his heirs," and should convey the same estate as they would. Nay, their natural import is precisely the same: and, if intention were the sole ground of construction, the words "in fee," or "for ever," must have that operation. But, although the releasor may have intended to use them in that sense, the heir at law, or remainderman, will view them in another; for he will say, these words must be understood according to their legal import; and the law says; that these words and circumstances, whatever they may import in private

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opinion,

opinion, import nothing like that in *Westminster-Hall*. A donor or lessor may say, he means what he pleases; but he must have done what he meant, or his acts will not attach upon the estate; for as long as the law considers doing as one thing, and intending to do as another; "*intending*," without "*doing*," will never bind the rights of third persons.

But, then the court of King's Bench say, "the lease was made as a provision for a daughter." It is difficult to discover how the lessee's being a daughter can help the argument, unless it is used to interest our passions, in the event of the cause. The argument that the lessor, acting under such a power, meant, *from the very circumstance* of moving toward effecting it, to execute it in a valid manner, in the case of such a lease made to a stranger, appears to me, to be equally forcible: for this power of leasing, is not meant to give any *advantage* to the tenant for life, except that of being able to contract with a lessee upon such terms, as will induce a tenant to give the best rent for the premises. He is intended, *by the donor*, no *benefit* from the estate after his life interest therein determines. Therefore, he is restricted, in the execution of such power,
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to reserve the *best* rent, and to do every thing to secure to *him* in *remainder*, the full and absolute enjoyment of the estate. Such lease, therefore, cannot be made upon fines paid, as church leases may, nor is a lessee under them, intitled to an equal degree of favor, in an abstract view of the transaction, as a lessee under a church lease; for the latter is a purchaser for a valuable consideration, *viz.* for a fine, and has paid the purchase money in a gross sum. But a lessee, under these special leasing powers, is to be viewed in the same light as any under-lessee, who, if his lessor's title be bad, or if his conveyance be imperfect; must fail, in a contest with those who have a title paramount to that of such lessor; for it is the negligence of the lessee, that he did not see that he was secure in his title, *et leges vigilantibus non dormientibus subveniant*. And if his title be imperfect, and the title of him in remainder be perfect, the former must fail in the competition. Such a lease *then* being made to a daughter, rather furnishes arguments against favoring it than otherwise; for, unless the lease be *de facto*, a fraud upon the power, it can never furnish a provision for a daughter: for such lease is intended, by the donor of the power, to be a mere farming lease, and such as a man would make were he actually

owner of the estate, and procuring the best bargain for himself that could be had : and, though it may happen, from accidental circumstances, that such a power may be *legally* executed by being *formally*, though in truth not *substantially* pursued, as where an estate becomes worth *more* than the *ancient rent*, and the *ancient rent* is the *criterion*, by which the value is to be measured ; yet, such a lease is, *in truth*, a *fraud* upon the power, and inequitable in respect of the remainder-man ; for by the *manifest* intent of the donor, he ought, when his interest vests in possession, to have the *full* and *complete* enjoyment. Where then is the equity upon which such lease, if irregular in the most minute circumstance, ought to be supported ? How can its being intended as a provision for a daughter, furnish an argument in its favor, when it was not *intended*, by the donor that it should be *applied* for that purpose ? If either side be intitled to favor, it is the remainder-man, whose right is violated by such lease, not the lessee, who holds *against the intent* of the donor of the power, and in prejudice of the remainder-man.

It is contended, that this construction of the words, *from the day of the date*, is a subtlety. Is it a subtlety to expound words according

according to their natural sense and import? certainly not. Is it a subtlety to annex to particular words a certain technical meaning; and, *thereby*, to prevent the possibility of question respecting their signification? Any one who will attend in *Westminster-Hall*, and observe the endless questions that arise upon the intent of parties, in the use of words in wills, and how few questions are there agitated, respecting the meaning of words used in strict conveyances, where they have a fixed, known, technical import, must answer, no. Why, then, is there more subtlety in saying, that the phrases, "from the date" and "from the day of the date," shall have different constructions in a legal instrument, the *natural import* of the words being *indisputably* different, than in saying, that a gift "to a man and his heirs," and, "a gift to a man in fee," or "for ever," if made by a strict conveyance, shall receive a different construction, the natural meaning of both phrases being, *indisputably*, the same in common sense, and ordinary language?

The truth is, that property, when it extends beyond the right of possession and use, is the creature of positive law; and, as there can be no individual right in things, beyond the right of actual possession and use, unless,

by virtue of municipal institution, the modes of enjoying property in things must be referred to positive law, and be governed thereby. For all things being thereby, as far as they are capable, *appropriated*, must, unless alienated according to the forms thereby prescribed, fall to the share of the *civil* occupant; whose title is superior to every persons, except his who claims by a better title, *viz.* that of an alienee having a good title from the alienor.

The construction contended for, it is said, “ will overturn property, and defeat the intention of parties, without answering any one good end or purpose whatsoever.” Is it overturning property to decide, where a man’s right to lease is derived under a power, which power is restrained to leases particularly circumstanced, that, if those circumstances be not complied with, the lease shall not be valid? If a power require a lease made under it to be *in possession*, and not in reversion, and every lease *not* in possession be a lease *in reversion*, can a lease *not* in possession be an execution of that power? Can a court determine, that a lease, which, for an instant, is not *in possession*, is not a lease in reversion? certainly
not;

not; for no court can alter the *essential* nature of things. Can a court then say, that although it be *de facto*, a lease in reversion, yet it is a lease in possession with relation to the power? Strange, indeed, would be the law founded on such a doctrine. If we are to take a distinction between reversionary leases, and, to say, that a lease in reversion, though, but for an instant, shall be valid under a power to lease *in possession*, where is the line to be drawn? The question *then* will not be, whether a power be executed *modo et forma*, but, whether the mode of executing it, be injurious or not, to him in remainder. Whereas, in the construction of these kind of powers, the only question is, whether the power *be pursued*, not whether the remainder-man be prejudiced. And, therefore, it is laid down in the 6th *Resol.* in *Mountjoy's* case, upon powers given to tenant in tail, to lease by 32 *Hen. 8.* “ *that if tenant*
“ *in tail reserve a less rent to himself during*
“ *his life, and “ after his death,” the true*
“ *and ancient rent, the lease is not good.*” And, yet the statute was made *principally* for the benefit of heirs in tail, &c. But, notwithstanding *that*, the reservation ought, in construction of law, to be of the true and ancient rent during the whole time.

But, then it is said, that, “ if the construction contended for be right, it would hold good, supposing the lessee had laid out ever so much money upon the estate, and all would be alike defeated by a mere blunder of the attorney, or his clerk.” In answer to this part of the argument, I shall state Lord *Cowper*’s reasoning in opening his judgment in the case of *Orby v. Mobun*, and Lord *Mansfield*’s observations as to the second point in the case of *Goodtitle v. Funican*. The question in *Orby v. Mobun* was, as to a reservation of rent in leases under a power like the present, exercised in favor of the family of the donee thereof, at a time when he was in sickness, and when he could not get at the rent rolls, or old leases to guide himself as to the reservation of rent, *they being withheld by a party interested*. His lordship’s language was this: “ It is agreed, by my Lord Chief Justices,” (who assisted in that case), “ to be a question *merely* at common law, and not to have a different determination in this court,” (the court of Chancery), “ from what it would receive in the courts below; and it is here now in the same manner as if there had been a special verdict here before me, where equity cannot aid, nor will it help this lease, it not being completely executed in all respects; I speak
this

Vid. infra.

Dougl. 544.

Gilb. Rep.
Eq. 46.

this, because the counsel for the plaintiff seemed to direct something this way : as if, in case any thing were wanting, it might be relieved : and I *am clearly* of opinion, that it being a *voluntary* execution of a power, not done upon a valuable consideration, it is not a matter, by any means proper, to go before a Master upon, but must *stand or fall* as it can ; for, if it be good, it must be decreed good ; if *bad*, it must be decreed *bad, though never so inconvenient*, to the remainder-man or the *lessee*." And, upon the same principle, Lord *Mansfield* said, in *Goodtitle v. Funican*. " Powers are now a common modification of property in land, and, as such, are to be carried into effect *according to the intention* of those who create them. There is no ground or reason of *equity or policy*, between the *tenant for life*, and the remainder-man, *for leaning* on either side."

If then it be true, that neither party, in the principal case, have *any other claim* than that which is founded on being in possession of the best title *in law*, to the premises subjected to the power, we must, more fully to ascertain that fact, advert to the authorities to be found in our books upon this question. I shall therefore first take a concise view of the cases, that are *precisely in point*, to shew what
ought

ought to have been the construction, of the lease now under consideration, and then endeavour to shew the distinction between these cases, and those which are cited by the court of King's Bench, as furnishing a ground for the allegation, that "the authorities themselves were so many contradictions backwards, and forwards." And while I am endeavouring to establish my own proposition, as to the true grounds of those cases, attempt to answer such arguments, on the other side, as fall in my way.

Berwick's
case, 2 Resol.
5 Rep. 93, b.
McCore 393.
Hil. 37 Eliz.

The first case I shall cite to shew the legal construction of the words "from the *day* of the date" is *Berwick's* case. There the queen granted a manor to B. "*a DIE confessionis*" *earundem literarum patentium*, for the lives of three others and the survivor. And one question was, whether the patent for life "*à DIE confessionis*" was not void; because a freehold was thereby to pass from a time to come. And it was resolved that by the grant *habendum* "*a DIE confessionis, &c.*" the day of the date itself was *without question* excluded, and that the demise could not begin, nor the lessee enter, before the next day; for that (*a*) or (*ab*) *est dictio significativa primi termini à quo, sicut a dictio (usque) termini*

termini ad quem; et (a) vel (ab) accipitur
EXCLUSIVE.

The next case I shall cite is that of *Douglafs v. Shank*, the question on which arose in a point of pleading. There, in an *ejectione firme*, the plaintiff declared of a lease for years *habendum "à die datus,"* *virtute cujus demissionis* he entered and was possessed, until ejected by the defendant. The defendant pleaded not guilty. And, after verdict for the plaintiff, it was alledged, in arrest of judgment, that the declaration was not good, because the time of the entering was not alledged; for, if he *entered* on the *day of the demise* he was a disseisor, and the action not maintainable; *for the lease did not commence until the day after*, it being *habendum à die datus*. And it was resolved, that the declaration was ill *for this cause*, and adjudged for the defendant.

Douglafs v. Shank,
Cro. Eliz.
766. Mich.
41, 42. Eliz.

Again, where *R.* and his wife were tenants for life. Afterwards the lessor, by indenture, betwixt him and the lessees and their son, dated 30th July, 21 *Eliz.* let it to the said baron and feme and their son, *habendum à die datus indenturæ* for their lives. And this being a freehold lease, one question was, whether this second lease were good, being
to

Mellows v. May,
Cro. Eliz.
873. S. C.
Moore 636.
Trin. 43 Eliz.

to commence *à die datus*, which was *a day to come*: and it was resolved by all the court, that the second lease was *void*; for as much as it was *habendum à die datus*.

Hemings v.
Puncharden,
1 Roll. Abr.
828. B.
5 Jac. B. R.
S. C. Cro. Ja.
853. et infra.

So, where the question was, whether a lease of land, at the time of making, was made to hold for life “from the *day* of the date,” or “at the day of the date;” or whether “from” was altered to “at” afterwards; and it was found that the deed at the making was “from the day of the date,” and the lease was therefore held void.

Bull v.
Wytot,
1 Roll. Abr.
828.
Mich. 10 Car.

And in a case where a man made a lease of land to hold for life “from the *day* of the date,” it was agreed *by the court* without question, and admitted that it was a void lease; for that a freehold could not be granted *in futuro*, and the *day* of the date was in this case excluded.

Butler v.
Fincher,
Hil. 12 Jac.
2 Bulst. 302.
S. C.
1 Roll. Rep.
229.

The next case I shall mention is that of *Butler v. Fincher*, which arose on an *ejectione firmæ*. There the dean and chapter of *Worcester* made a lease for life, *habendum* “from the *day* of the date;” and made a letter of attorney to make livery *secundum formam chartæ*. The attorney made livery the day after. The jury found the lease

lease for life made the 25th day of, &c. and that the livery by attorney was made, *post vicesimum quintum diem predictum*. The question was, whether the lease, thus made and executed, was good? At this time the question, as to the time at which such a lease commenced, was so well understood, that the counsel, in that case, did not even attempt to support the lease upon the ground, of its not being a lease to commence *in futuro* but resorted to another ground; namely, the effect of the livery, which we shall observe upon hereafter: but the whole scope of the argument of both the bar and the bench admits, that if the lease in this case could not be assisted by the livery, it was *indisputably* void. But what *Dodridge* said, was material; for he observed that if a lease be made and sealed in the forenoon to take effect "*a die datus*," the same day is exclusive; and if a lease *for years* be made "*a die datus*," the lessee ought to prove his entry *the day after* the lease made; if a lease be made 1st *Maii* "*a die datus*," this is to begin 2d *Maii*; if this be delivered 1st *Maii* in the forenoon, or in the afternoon, it is not good, for *quod ab initio non valet, tractu temporis non convalescit*.

Scavage v.
Parker,
Cro. Jac. 647.
Mich. 20 Jac.

So, on an *ejectione firme* of a lease of *Lacy Lady Griffin*, 7th *January*, 19 *Jac.* by indenture, dated 6th *December*, 19 *Jac.* "*habendum a die datus indenturæ prædictæ*, upon not guilty pleaded, and evidence to the jury, a lease was shewn, bearing date 6th *December*, 19 *Jac.* and the *habendum* was "*à tempore confectiōis indenturæ*." And, because "*à die datus*" excludes the day, so that this was not the same lease whereof the plaintiff declared, it was held that the plaintiff had mistaken his action. Wherefore he was nonsuited.

Hall v. Dewe,
2 Roll. Abr.
521. 10.
Mich. 2 Car.

Again, where a man brought an action of debt, for rent due at the feast of *St. Michael* and the Annunciation, and declared that 25th *March*, 15 *Jac.* he leased certain lands to the defendant *habendum "ab inde"* for a year, rendering so much rent half yearly at the feast of *St. Michael* and the Annunciation, by equal portions during the term. It was moved in arrest of judgment, that the lease commenced the 25th day of *March*, and then the rent was reserved after the term was determined, in which case no action lay for it: but it was resolved that by the word "*ab inde*," the 25th day of *March* having been before mentioned, the said 25th day should be taken *exclusive*, and therefore

fore that the rent was reserved within the term.

And, in the following case, in which the lease was so penned as to make an exception out of the general rule of law, as to the construction of those words, the rule itself was admitted, and confirmed in express terms. Thus, *L.*, seised in fee of the tenements in question; levied a fine thereof to the uses contained in an indenture, &c. made before the fine; namely, to the use of *L.* during his life, and after his decease, to him for twelve years, remainder to his eldest issue-male, &c. And, in the indenture there was a proviso; and it was covenanted between the parties to the indentures that, if the said *L.* should afterwards make any demise of the said premises, or any part thereof, by indenture to any person for any number of years, *not EXCEEDING THE NUMBER of ninety-nine years*, from the *time of the making* of such demise, reserving thereupon the ancient rent during the said term, that then the conusee should be seised to the use of such person, and his executors for so many years, as should be comprized in the said demise, and, according to such conditions and covenants, as should be contained in the said indentures. *L.*, afterwards, by indenture dated 16th March, 26 Eliz., but delivered

Harcourt v.
Poole,
1 Andrews
273.
Mich. 33
Eliz.

livered the 17th *March* the same year, demised the premises to *W.* to hold the same "*à die confectiōis indenturæ prædictæ,*" for sixty years *then* next following, rendering annually, &c. It was objected, that this lease was void, and not warranted by the limitation of the uses, inasmuch as that it ought to have been limited "*from the making*" of such demise; and not "*from the day* of the making of the indenture;" for that commencement was after the time that the limitation of uses appointed, and for that reason the lease was void. But the court agreed that the lease was good; for they said that it was plain that the lease was well warranted by the limitation of the uses, because that the words of the proviso, *scil.* "*from the time* of the making of such demise," were not for the purpose, nor bore the sense *to appoint, or limit, when* the lease was to begin, but for another purpose; namely, to restrain *L.* from making any lease for more years than ninety-nine from the making thereof; which words did not restrain him from making a lease for sixty years, to commence twenty years afterwards, and had he made such a lease it would have been good; because he did not *exceed* ninety-nine years *from the time of making* the lease; and the proviso was as much in sense, as if he had said,

said, that he might make leases for ninety-nine years, or for any other time that did not exceed that number of years. But the argument of the court in this case admits, that had the clause not been so particularly penned, as to distinguish this limitation from a limitation "*habendum à die datus*," or "*confectionis indenturæ*," the rule of law must have prevailed; but that this case, *from its particular penning*, did not fall within the rule.

For other cases on this head, vid. *infra* Banks v. Brown, Seybroke v. Ball, &c.

But in cases of leases for lives, which, unless made by virtue of powers, require an actual livery, this flaw in the title of the lessee, in respect of the commencement of his lease, has now and then been cured by the timely interposition of that ceremony.

The first instance in which I find an attempt made to support a lease for life, limited to commence after the day of the date, by suggesting that its commencement began from the time of the delivery, is the before-mentioned case of *Mellows and May*, there, as has been stated, the lease bore date 30th of July, 21 Elizabeth, and the *habendum* was "*à die datus indenturæ*" for three lives; and livery was made, 23 Eliz. *secundum formam chartæ*: and the court, as the

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case

Mellows v. May, supra, Cro. Eliz. 873. Moore 636.

case is stated, *Cro. Eliz.* 873. held, that the livery being made so long time after, could not help it. But in *Moore* 637, it is said, that the lease was with power of attorney to make livery, and the indenture was sealed and delivered the *day* of the date, and the livery made a month afterwards: and that it was resolved that it was good, because the livery was executed after the day of the date, *but if it had been made previous to that day it would not have been so.*

Infra 489,
490.

It is not possible, at this distance of time, to find out which of the reporters state the judgment, as to this fact, right; but I rather apprehend, for reasons I shall by and by mention, that *Moore's* report of this case is the most correct.

Banks v.
Browne,
Moore 759.
Pasch. 3 Jac.

The next case in which this question was agitated, was that of *Banks v. Browne*, which was the case of a lease made of tenements in *Berkshire*. The land was copyhold for life, and one, seised of it for his life, surrendered to K., lord of the manor *in tail*, with reversion in the crown. K. made a lease for three lives to several persons his relations, *to commence "from the day of the date,"* and the ancient copyhold rent was reserved, and more. And one question thereupon was, if this lease to commence "*from the day of the date,*" was

good within the statute 32 H. 8. cap. 28. And it was agreed that it was, there being *proof* that the *livery* was made *after the date*.

But a distinction is taken where the delivery is made *by the lessor himself*, and when *by attorney*; for, in the latter case, unless the power be *expressly* worded, so as to leave the time of the making livery to the *discretion* of the attorney, the lease will *not* be *helped* thereby; for, if a lease be bad in itself, it is not *then* in the power of the attorney, by his livery, to make it good; because the lease and the livery, are *one act* of the lessor in consideration of law.

Thus, where a messuage was demised by indenture, 10th of June, 44 *Elix. habendum* "*a die datas*" *indenturae predictae* for life of the lessee, with letter of attorney to make livery, and the attorney made livery the 23d of July, &c. The question was, whether this livery, made after the day of the date, was good, or not? and *Popham*, *Fenner*, and *Wynch* held it to be void; because it was made by attorney, who had not any such warrant; and *Popham* said that, if the deed had been delivered after the day of the date, and then livery had been made by attorney, it would have been well enough.

Hennings v. Paucharden, Cro. Jac. 153. East. 5 Jac. vid. supra.

Butler v.
Fincher,
2 Bulst. 302,
1 Roll. Rep.
229, *supra*.

So, in the before-mentioned case of *Butler v. Fincher*, which arose upon an action of trespass and ejectment, the lease, as hath been said, was *habendum* "from the day of the date," and there was a *letter of attorney* to make livery *secundum formam chartæ*. The attorney made livery the day after. The jury found the lease for life made the 25th day of, &c., and that the livery by attorney was made, "*post vicefimum quintum diem prædictum*." And upon the question, whether this was good, in regard that the livery was made *by attorney* the day after? it was argued that, if the same had been made the first day, then the lease had been void, *clearly*. First, Because an estate of freehold cannot begin *in futuro*. Secondly, Because, if this should be good, then the lessor should have a particular and a lesser estate than he had before in the land, and that by his own act, and without any donor, which should not be for the great inconvenience of it; but, by making this livery the day after, all this inconvenience would be avoided. And they contended that the livery made the estate and not the deed; that, in this case, by the delivery the day after, the estate did then begin presently; otherwise it would have been, if he had made livery the first day, the livery being made, operated only

at the same time that the estate, in judgment of law, had its commencement, and so by this no freehold was to pass *in futuro*; for, *here* the deed passed nothing, but all passed by the livery; for, in a lease for life, or a feoffment, the livery carried the estate, and that was principally of force, and all which did pass, passed by that. As to the objection, that the attorney had authority to make livery *only, secundum formam chartæ*, and that if he made this livery the first day, it would not be good, and that it would be a great inconvenience, that the attorney should have such a liberty, and election to make this lease good or void *merely* by his act: as to this, it was no inconvenience, because this was then all one as if it had been done by the lessor himself, he having a general warrant to do it. He was to make it *secundum formam et effectum chartæ*, this related to estates, and to other things requisite, and to be directed by the deed; and, *secundum effectum chartæ*, this was the essence of the deed, to have the deed to be good and effectual, and if the lessor *himself* had not made livery of the same until the next day, this had been good, so it should be also, being then made by his attorney: for *qui per alium facit, per seipsum facere videtur*, and so this lease being good, judgment was prayed for the plaintiff.

This case was then adjourned for further argument. And, after it had been moved again, and long argued, Lord *Coke* said, that, as to the livery made by the attorney, he would be better advised; for, it was not in the power of the attorney to make this lease good by his livery of seisin made after the day, which, *in itself*, was void. So, that thereby this lease was not made good, the time of the making the livery of seisin was not material; the letter of attorney was for him to make livery, *secundum formam chartæ*, the lease being *habendum "a die datus."* If he made livery two or three days after, all was one; but the very pinch of the case stood upon the very *fabrick* of this deed: and this was void clearly, for a freehold granted, ought to begin presently, and not *in futuro*, and 30 *E. 3. fol. 31.* the last plea, it was put for a rule by *Mombraie*, "that where a warrant was made to make livery of seisin, according to the force and effect of a deed, the which deed, in law, was of no force or effect, *sequitur*, that the livery made upon such deed was altogether void," as where a reversion was granted for life from *Michaelmas* next, and the tenant attorned after *Michaelmas*, this was not good. And *Coke*, *Dodridge*, and *Haughton* agreed, that "where the *fabrick* of a deed was void in itself, the let-
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ter of attorney to make livery thereon, was also void; and that it was not in the power of the attorney, by any act of his, to make this lease good."

And, in the case of *Bull v. Wyot*, it was agreed by the court without question, and admitted, that, if a man made a lease of land to hold for life, "*from the day of the date,*" and made livery by attorney the same day, *secundum formam chartæ*, that was a void lease; because a freehold could not be granted *in futuro*, and the act of the attorney could not affect the act of the principal.

Supra, 476.
10 Car.

So, where *A.* and *B.* his wife, seised, in right of *B.* of lands in fee, by indenture dated the 20th of *August*, 2 *Ed.* 6. between them and *F.*, let the land to *F.* and his wife and their daughter, *habendum to them and the longer liver of them from Michaelmas following*, for the term of their lives, &c. and after *Michaelmas* *A.* and *B.* made livery to *F.* and his wife, and their daughter according to the indenture. One question was, whether this lease *habendum* from *Michaelmas* for three lives, and livery made after *Michaelmas* *secundum formam chartæ* were good or not, in respect the limitation was of a freehold to begin at a future time, and no livery made

Greenwood
v. Tyler,
Cro. Jac. 563.

until after *Michaelmas*. And as to that point it was resolved that it was *good enough*, for the difference was where the livery was made by the lessor in person, and where by letter of attorney; being in the same charter *generally* made; for livery in the latter case would not help, because there was not any intention that the livery should operate *futurely*, but that livery should be made when the deed should operate, and that the estate should be good *presently*.

Hob. 314.

But there being another point in the preceding case, a writ of error was brought thereon in the Exchequer-chamber, and some doubts being entertained, the parties afterwards finished the matter by composition.

Wheeler v.
Denby, cited,
Cro. Car. 95.

So, it was adjudged in the Common Pleas, *Pasch, 5 Jac.* where the jury, in an *ejectione firmæ*, found that *Richard* Bishop of *Gloucester*, seised in fee of the tenements in question, by indenture, bearing date the 8th of Queen *Elizabeth*, demised the same to *D.* and *W.*, *habendum* to the said *D.* for his life, rendering three shillings and two-pence, by the year, &c., that although the lease were for life, *habendum* "*à die datus*," yet, it being found "*quod episcopus demisit*," it should be intended that livery was made
after

after the day *by him*, and then it was a good lease. The principle of which decision seems to be, that the jury having found *generally* "*quod episcopus demisit*," every thing necessary to support that verdict was to be intended as found, and then upon the ground of the foregoing cases, it must be presumed that the bishop himself (the lessor) *in person* made livery after the day.

But it was said by the court in the case of *Greenwood v. Tyler*, that if the letter of attorney had been *expressly* to make livery after *Michaelmas*, then the lease would have been good enough. Supra, 487.

This is the *true ground* upon which the court of Common Pleas went in the case of *Freeman v. West*; for, by a note added to that case by the reporter, it appears, that the court there said, "that they would presume that the power given to the attorney was to make livery at ANY day subsequent to the lease, which they said was the *true meaning* of the deed:" for neither the case of *Banks and Brown*, *Moore* 759, nor the case of *Mellows v. May*, which are there relied on, would, in any other view, have warranted that judgment. And the case of *Seybroke v. Ball*, is on the other side the question;

Infra.

tion; for, in *Banks and Brown*, no power of attorney is mentioned; therefore, in order to support that case, *as law*, we must conclude that the livery *there* was made by the lessor *himself*, which brings that case within the distinction taken in *Greenwood v. Tyler*;

Supra.

and in *Mellows v. May*, the nature of the power of attorney is not stated, therefore, in support of that case, we must conclude, that

Supra.

the power was such, as expressly authorized the delivery when it was made; for otherwise that decision would contravene those of

Supra.

Henning v. Paucharden, *Bull v. Wyott*, *Seybroke v. Ball*, and *Greenwood v. Tyler*. There-

Supra.

fore the court in *Freeman v. West*, distinguished an *authority* to deliver "*secundum formam chartæ*," from an *authority* to deliver according to the *effect, tenor, and true meaning* of the lease; considering *the latter words* as giving a discretionary power to the attorney, which *the former words* had been determined *not* to give him.

The reason why livery by the *lessor* in some cases helps the deed, seems to be that, *in the case of a freehold*, livery is, *at law*, of the *essence* of the conveyance, and no such interest can pass from the lessor to the lessee, but by that symbolical act *alone*, THAT, therefore, gives *life and operation* to the deed as to its conveying

conveying an interest; but a lease for life might *then* have been made by livery *in pais* only, and an interest would have passed, thereby, from the lessor *by parol*, without *any deed*. The law, therefore, to support, the transaction, *presumes*, that the lessor meant to pass no interest until livery made, because no interest could pass until *then*; and considers the deed, in such case, as only pointing out the particular circumstances of the contract. And the conclusion seems perfectly reasonable; namely, that when the lessor makes such a deed, and leaves to a future day the doing that act, without which the deed is but a dead letter, his intention is to abandon that deed, so far as the same operates to convey an interest which cannot take effect but by livery, and to make a lease by livery without deed. But, if the lessor expressly refer to the deed, he *thereby* rebuts this presumption, furnishing himself a positive evidence, that he did intend the deed and the livery to enure as one assurance. And then the livery takes effect as part of the deed, and, *consequently*, if the lease be to begin from the day of the date, it will be the lease of *a freehold* to commence *in futuro*, and so *void*.

Thus,

Seybroke v.
Ball, 1 Roll.
Abr. 828. 2.

Thus it was agreed by the judges in *Camera Stellata, Pasch. 15 Ja.* and by the court of King's Bench, *Mich. 15 Ja.* in the case of *Seybroke v. Ball*, that if a man made a deed of lease of land to hold for life "*from the day of the date,*" and made livery himself the same day *secundum formam chartæ*, it was a void grant; because, that *the day of the date* was excluded by the deed, and the livery had reference to the deed, and a freehold could not be granted *in futuro*.

But, whenever the precise time of the day at which livery on a lease is made, becomes essential to be known, in order to determine the rights of third persons, the *instant* in which that act takes place, is a fact, to be found by a jury, and no presumption can be made respecting it, if evidence can be procured to ascertain it. In such case, therefore, the better opinion seems to be, that no court of law can give judgment upon such a lease, unless the express moment of delivery be found by a jury. If, therefore, that fact be not found, the verdict will be defective, and a *venire facias de novo*, must issue.

Supra 484.

Thus it was held, in the case of *Butler v. Fincher*, by Lord Coke, who observed, that *finis unius diei, est principium alterius, et eo instanti,*

stanti, that the one day ends, the other begins ; why then, said his lordship, should it not be intended, in that case, to make the lease and livery good, that the lessor made the livery in the very same instant of time, at which the first day did end ; for the one day ends, and the other begins all *at one instant*, and the lease might be made good by such a favorable construction, *ut res magis valeat, quam pereat* ; and this especially, when no time of the livery made was found certain, and if it had been made in this manner, it would have been good. *Dodderidge* then observed, that if a lease for life were made and dated 1st *Maii*, with a letter of attorney to make livery, who made it the second day, this was good, for the deed was one thing, and the delivery another ; and, “ *a die datus*,” that which was in the deed “ *datus*,” was the time of the delivery, wherefore should not this be so intended. *Coke* agreed with him herein, if *it had been so* ; but said, that it was in this case found, *that he delivered this the first day*, but if he had delivered this deed which purported the lease, the second day, when the livery was made, that had been good ; but why, said he, should not this be so intended by a reasonable intendment, *ut res magis valeat, &c.* that the livery was made by the attorney, the last instant of

Vide supra,
434, 435.
et quære de
hoc ?

quære.

Vid. supra,
et quære.

of the first day. *Haughton*, justice, replied, that this should not be so intended; *the jury were not to be charged with an uncertainty*; all should be one to them (the court), if the livery were made in the forenoon, the afternoon, or in the last instant of the first day. They did find this deed the same day. *Doderidge* then said, *that this was merely a matter of fact, and, therefore, not to be "taken by such an intendment," to be done at such or such a time.* *Coke* said, if any thing would avail to make the lease good, it must be that or nothing: it was well said, that *ad questionem facti non respondent juris-prudentes, ad questionem juris, non respondent juratores.* *Doderidge*, then observed that, *here*, the uncertainty was merely in a matter in fact, *viz.* whether the livery was made in the forenoon, afternoon, or in the last instant of the first day; *and therefore, this was not to be taken by them by intendment, one way or other.*

And, afterwards, the case being again argued, which was the third time, the court were *clearly* of opinion, that as the verdict stood, the lease could not be supported, and that the verdict was defective, the jury not having found the certain time when the lease was delivered, and that, therefore, a *venire facias de novo*, must be awarded.

I have

I have stated the observations of the court upon this point, in the preceding case at large, to shew that the judges, who then presided, thought themselves not warranted to presume any fact respecting a lease, however strong their inclination was so to do.

Having sufficiently noticed, in the preceding part of this essay, what is the legal construction of a limitation by lease, *habendum*, "*a die datus*," and in what cases, and how far, the circumstance of livery will uphold freehold leases in that predicament, we now come to the consideration of a limitation by a lease *habendum*, "*from thenceforth*," or "*from the date thereof*." In which cases, it appears that, "*from thenceforth*," or "*from the date*," is considered, in law, the same as *from the delivery*; and consequently, as a reference to *that act*, as the "*terminus a quo*," the lease is to begin, or the reckoning of time to commence.

The first instance in which I find this point agitated is, in *Dyer*, on a motion in arrest of judgment in *ejectione firmæ*, wherein it was alledged, that the plaintiff had supposed, in his declaration, that the lease made to him, "*8th die Maii*," *anno*, &c. *Habendum pro termino 31 Annorum, EX TUNC proximo*

Dyer 286.
Pl. 43. Trin.
11 Eliz.

proximo sequentium et plenarie complendum, &c. Virtute cujusque idem querens postea, scilicet, eodem & die Maii, &c. in tenementis predictis intravit, &c. And the question was, if this entry should be adjudged in law before the commencement of the lease? for some said, that the term, by the intendment of (*ex tunc*), should not commence before the next day, viz. ninth day; but others were of a contrary opinion, by reason of the words, "*post viz. Eodem die, &c.*" Et "*ex tunc*," they said, should be intended, at *one* instant of the day, and the term should immediately commence at that instant, as in the morning, &c. But no judgment appears to have been given on this case.

Dyer 307. 2.
Pl. 67.

This question was again agitated, *Hil. 14 Eliz.* upon a statute merchant, acknowledged and dated the 26th day of July, 6th *Eliz.* The next day after, viz. the 27th the conuzee, intending to release all debts, actions, demands, and executions, due to him by the conusor (except the duty of the said statute), caused the conusor to draw up a general release, &c. who did it in these words, viz. "all debts, demands, &c. at any time due to him (the conuzee), from the beginning of the world *until the making of those presents.* In witness whereof, I have
" set

“ set to my seal, dated the 27th day of July,
 “ in the 6th year, &c.” But the conuzee
 finding fault with the date, fearing lest the
 statute should be also released, caused the
 date to be altered to the 25th, and then he
 immediately sealed and delivered the release
 as his deed. Upon this release, the conuzor
 grounded an *audita querela*, with an aver-
 ment, that it was first delivered as the deed of
 the conuzee the *said 27th day, &c.* which be-
 ing denied, it was found by verdict to have
 been so delivered. But on the back of the re-
 lease was written, “ sealed and delivered, in the
 presence of four persons there named, the
 25th day of July, &c.” And it was held, that,
 in law, the release was a discharge of the sta-
 tute and execution ; because, that it was first
 delivered *the 27th day*, and that was the day
of the making of the release ; and it was not
 to take effect from the dating ; but if it had
 been “ *until the day of the date*” thereof,
 the statute had remained in force unreleased :
 but it was first delivered after the date of
 the statute.

So, it hath been held, that a lease made
habendum, “ from henceforth,” is a lease
in presenti, or *in possession*, and commences
 from the *moment* in which it is made. Thus
 where indentures of demise were ingrossed,

Clayton's
Case, 5 Rep.
1 Mich.
27, 28 Eliz.

bearing date the 26th of *May*, 25 *Eliz.* of land in *L.*, to have and to hold “from henceforth,” and the said indentures were delivered at four o’clock in the afternoon, the 20th day of *June*, *anno supradicto*: One question was, when this lease should have its beginning, whether *from the day* of the date, or *from the delivery*. And it was resolved, by *Wray*, Chief Justice, Sir *Thomas Gawdy*, and the whole court. First, That “*from henceforth*,” should be accounted *from the delivery* of the indentures, and not by any computation of date; for, “*from henceforth*,” was as much as to say, “*from the making*,” or “*from the time* of the delivery of the indentures,” or “*a confectiōe presentium*,” for the confectiō or making the lease did begin by the *delivery*, and those words “*from henceforth*,” or any other words of the indenture, were not of an effect or force until delivery, *quia traditio loqui facit chartam*; Secondly, That, in this case, the *day* of the delivery of the lease should be taken *inclusive*, and the day itself was parcel of the demise: So, it was when the demise was limited to begin, “*from the making*.” But if the lease were to begin “*from the day of the making*, or “*from the day of the date*,” there the *day itself* of the date would be *excluded*.

And

And the rule of law would be the same, if a man leased for years, to hold "*from the sealing and delivery of the deed*;" the day, in that case, would not be excluded; but it would commence immediately after the delivery.

Higham v.
Cole, 2 Roll.
Abr. 520.
Hill. 32 Eliz.

And a lease made *habendum*, "*from the date*," has the same operation, in law, as "*from henceforth*," or "*from the delivery*" of the indenture, or "*from the making*." As, where a lease was made 1 Jan. 3 Jac. *habendum* "*a datu indenturæ predictæ*," and an ejectment brought thereon the *same* day; it was moved in arrest of judgment, that this lease being made "*habendum a datu indenturæ predictæ*," was as much as to say, "*from the day of the date*," and then the ejectment being the *same* day, it was ill alledged. But *all* the court resolved, that the *date* was the time of the *delivery*, and it differed from the *time*, or "*day*" of the date; wherefore, the ejectment alledged *postea*, the *same* day, was good enough.

Osbourne v.
Rider, Cro.
Ja. 135.
Hill. 3 Ja.

Et vid. infra,
Baker v.
Waller.

This question was again agitated in the case of *Hatter v. Ashe*, in the Common Pleas. In this case a prebendary made a lease for life, *habendum a datu*: and the question was, whether this lease bound the successor? which

Hatter v.
Ashe, 3 Lev.
438. S. C.
1 L. Raym.
84. Salk. 413.
Hill. 6 W.
and M.

depended upon, whether it was limited in possession or reversion. It was argued at the bar, three times in three several terms. And for the plaintiff it was contended ; First, That "*a datu*" was the same as "*a die datus*," and they cited *Clayton's Case*, 5 Co. 21. at the end of which case, it was so said, and then the delivery being the same day that the indenture bore date, the livery was void, because *it could not expect* ; and the *term* not commencing until the day *after* the day of the date, the livery, made the same day that the indenture bore date, was made before the term had any commencement, and so was void ; Secondly, That the lease was void, being a lease in reversion, not being to commence in interest until *a day after* the making or date, and, therefore, not good within the words of the statute of the 13 Eliz. c. 10. " that makes no lease by ecclesiastical persons good, made for more than " twenty-one years *from the time* of the making," and here the time of the making, and the day on which it was made were excluded ; for the lease was not a lease from the time of the making, nor commenced that day, but the *day after*. On the part of the defendant, it was answered that, *in propriety of speech*, "*datus*," *vel* "*dated*," in *English*, was the very act of delivery of the deed ;
 for

for "*datus*," in *Latin*, being taken as a participle, was "*given*" or "*delivered*" in *English*. And, "*datus*," taken as a substantive in *Latin*, was, in *English*, the "*date*" or "*delivery*," which signified all one; and, to avoid the observation, in *Clayton's* case, they said, that to make construction of a word that had equivocal sense, as this had, the *date* might be taken *the day that the deed bore teste*, and, so exclude all the *day of the date*; as, in common parlance, oftentimes *the date* of an indenture was taken for *the day* that the indenture bore date, and by that exposition, the deed would be void; or it might be taken *in its proper signification*, viz. "*the very date*" or "*delivery of the deed*," and then the lease would be good. That *here* to make the lease void was unreasonable; but it was more reasonable to expound the words that the lease should be good, and not to make all to no purpose, that the parties had done when the lease was made; and words should be taken always, "*ut res magis valeat quam pereat*."

After the arguments and authorities had been considered, it was adjudged, by *Nevil*, Justice, and the two *Powells*, *senior et junior*, for the defendant, the lessee, the Chief Justice, *Treby*, being of the contrary opinion,

K k 3 although

although he was, at first, (says the reporter) of the same opinion; but afterwards he changed his opinion, and was not present when judgment was given, but, 'as it was supposed, absented himself purposely.

The foregoing case is stated differently in 1 L. *Raymond* 84.; for it is there said to have been a lease of lands made by indenture, the 14th of *April*, *habendum* "*à datu*" *indenturae*, for three lives, and livery made the same day. But the objections taken to the lease, and the argument used by the counsel, and the judgment of the court is much the same in effect, as the report in *Levinz*; but it is there said, that *Treby*, was of opinion, against the lease on the authority of *Co. Litt.* and the other cases there cited, which are stated to have been *Clayton's* case, and the case of *Bacon v. Waller*, neither of which, we shall see, when we come to consider them, militate, in the *smallest degree* against the opinions delivered by the other judges.

We now come to those cases in which the last mentioned distinction between "*à die datus*," and "*a datu*," is not made; namely, those in which *habendum* "*a datu*" is considered as having the same import as "*habendum a die datus*," and both construed as
not

not including the day of the date. And, in this respect, a distinction hath uniformly been taken, in our books, between those cases where an *act* is resorted to, and those where a particular time, as a day, is resorted to, in order from that act or that day to ascertain the *terminus a quo*, an interest in a thing shall pass from one person and vest in another; for, in the former case, the *act done*, is the *terminus a quo*, the interest is to pass, but in the latter case, the end of the day named, is the *terminus a quo*, the interest is to pass, the day being in such case, considered in law, as an indivisible point, from which point the computation is to be made. And, in this view of it, the word "*date*" has, in law, two significations. In the one, the word "*date*" signifies the "*delivery*," and, in this sense, it is always taken, when applied to, as the *terminus a quo* an *interest* is to pass; and, a delivery being an act done, to which act the reference is made, the law, which makes no division of a day, appropriates the whole day to effect it in, and consequently, includes the whole day referred to. In the other signification, the word "*date*," denotes as well in ordinary parlance, as also in legal acceptance, "*the day of the date*." In which latter sense it is constantly received, in legal instruments, when a *computation* is to be made from a

Bellasis v.
Hester,
intra.

particular day *passed*. In such case, therefore, from the "*date*," and from "*the day of the date*," being synonymous, the day referred to by the word "*date*," as the *terminus a quo*, is always excluded.

This variance, in the construction of the words "*from the date*," when it is made use of to denote the *terminus a quo*, a computation, commencing at a time past, is to be made, and when to point out the *terminus a quo*, an immediate interest is to pass, (for "*a die datus*," has the same construction uniformly in both cases, and in all instances) seems to have arisen from the equivocal sense which the words "*from the date*" admit of, and, from the rule of law, that, where words in instruments admit of an equivocal sense, and there is no index, from the *res gestæ*, to shew the intention of those who use them, from whence one sense may be affixed to them in preference to another, they shall be taken in that sense which is most advantageous for him in whose favor the instrument is made: and therefore, as, in consideration of law, a possessory is preferable to an expectant interest, the law, in compliance with the rule last mentioned, has affixed to these words, when used to convey an interest, that construction which conveys the former estate, by considering

sidering a lease so circumstanced and worded, as including the day of the date; but when these words are used merely as a *terminus a quo* to compute from, in which case, it is the interest of the tenant that the time of enjoyment should be extended, the law, for the same reason, has affixed to these words that construction which excludes the day, because thereby the beneficial enjoyment thereof to the lessee, which arises from the actual possession, will be increased, as he will be in actual possession a day longer than he would, if the day computed from were to be included.

This distinction between the legal construction of these words, when used by way of *computation*, and when used by way of passing an *interest*, seems to have been first taken in a case which arose on the statute of the 27th *Hen. 8. c. 16.* which provided, “ that
 “ no lands, tenements, or hereditaments
 “ should pass by bargain and sale, if they
 “ were not conveyed by deed indented and
 “ inrolled within six months *next* after the
 “ *date* of the said indenture.” An indenture of bargain and sale dated 4th *October* 4 &c 5 *W. & M.* was inrolled the 21st day of *March* then next following, which was the last day of the six months, *not* accounting the *day of*
the

Moore 40.
 Dyer 218. b.
 Pl. 6.
 Trin. 4 Eliz.

Quære as put

the date of the indenture as any part of the six months; and the opinion of the court was, that the enrollment was well enough; for that all the entire day of the 4th of *October* should be accounted in law, the date of the indenture, and any part of the 21st day of *March*, which was the last day of the six months, should be said within six months; for the day of the date of the indenture should not be accounted parcel of the six months limited by the statute; for the date and the day of the date were all one, for the date was all the day; and therefore, if a lease were made for twenty years after the date of the lease, the lessee shall not enter the same day that the lease bears date, but the day next ensuing; *per Brown*. And this statute was enacted to make certain the *terre-tenants*, and so was the statute of uses. And with this view, the statute enacted, that no bargain and sale should be good without enrollment; so that, thereby, he that had cause of action might have resort to the *terre-tenant*. And, therefore, *the intent of the statute being to remove scruples*, it would be *unreasonable* to make so *scrupulous* a construction of it as that the *day of the date* should be parcel of the six months, especially, when, by common parlance, the date and the day of the date were all one. And it did not resemble

seemle the statute of the 32 *Hen.* 8. of leases, where it was said, “ that a lease made by “ tenant in tail should be good for twenty- “ one years *after the making* of the leases ;” for the *making* might be at one hour of the day, and was perfect by the livery at that time, and for that reason, the lease commenced immediately. And, so upon a debt on obligation, the defendant, might plead a release from the plaintiff *post confessionem scripti prædicti eisdem die et anno* ; because the making of that was at a certain time. And it had been agreed, that the Queen *Mary* should write herself Queen of the realm the day of her death, and, after her death, on the same day, Queen *Elizabeth* was written Queen, and both were true in respect of the several times of the day. And so in respect of the *distance* of time of the several acts ; as, if the ancestor were disseised on the day of his death, and the issue brought an assize of *mort-d’ancestor*, and the gift of the writ were to enquire, *if he were seised on the day on which he died*, it should be found for him. And the diversity was, where it was after the *day*, and after a *time* of the day. But, in *Dyer*, the court is reported to have said *that this was a narrow pinch*.

So,

Powel v.
Nanney,
1 Roll. Rep.
387. S.C. cit-
ed 3 Bulst.
203. Trin.
4 Ja.

So, in a case between *Powel* and *Nanney* in the exchequer, it was adjudged, that if a man lease land in interest, *habendum* "*à date*" that shall be taken *inclusive*, but *otherwise* where it did *not* commence in interest; as if the deed were dated at *a day passed*, and the *habendum* was "*à date*" that should be taken exclusive, because that was only to *begin* from the date in point of *computation*.

Lewelyn v.
Williams,
Cro. Ja. 258.
Mich. 8 Ja.

Again, in *ejectione firmæ*, the plaintiff declared upon a lease made the 12th *December*, *habendum* "*à primo die of December*." Upon not guilty pleaded, the jury found a lease made *in bac verba*, which was dated the *first of December*, *habendum* "from henceforth," but delivered the 12th *December*, and which could *not* therefore commence *in interest* until after that day. And the question was, Whether this lease supported the declaration? And it was objected, that "from the *day of the date*," and "from *henceforth*," were *several* commencements; for the one began upon the day on which the deed was sealed, the other the day after: But it was resolved by the court, that they were *both* one, being *a computation of time* "*from the time past*," and both should be pleaded to begin from the *day of the date*, "*when the lease was afterwards sealed at another day*."

But

But the court said, (expressly taking the distinction that I contend for) that, if he had declared of a lease of the first of *December*, (i. e. *made or delivered that day*) "*habendum a die datus*," the ejectment could not be alledged the same day ; but if a lease were made the first of *December*, *habendum* "hence-
"forth," the ejectment might be alledged the same day.

And *Fleming*, chief justice, on a question propounded, when a lease should be said to begin, took the same distinction ; for he said, that there was this difference where a deed was delivered to begin "*a die datus*," and where it was "*à datu*," for, when a deed was to take its force and essence "*a die datus*," in this case it was exclusive, and the day of the date was excluded : But otherwise, where it was "*a datu*," there it was inclusive, and the day included. This difference, he said, held place, and was good, where it was a *case* and *point of interest* that was conveyed or passed from one to another ; as in case of a lease for years, or any other interest that was passed, and so in *Clayton's* case. But, where it was in matter of *account*, where no matter of interest was to be passed or conveyed ; as if one were to be accountable to another, and that by deed, were the
same

1 Bulst. 177.
Trin. 9 Ja.

Supra. 498.

same to be done "*a die datus*," or "*a datu*;" in this case, *no interest* passing by the deed, were the same "*a die datus*," or "*a datu*," it was all one, and no difference between them, *to which positions all the court agreed.*

It is singular, that the court of King's Bench, in citing this opinion in their judgment in the case of *Pugh v. the Duke of Leeds*, overlooked the distinction here so particularly taken, which reconciles all the cases; and stated only the first part of *Fleming's* opinion.

Sir Thomas
Howard's
Case,
1 Ld. Raym.
480.

So where an action was brought upon a policy of insurance for insuring the life of Sir Thomas Howard for one year, "*from the day of the date*:" The policy was dated 3d September, 1697, and Sir Thomas died the 3d September, 1698, at one of the clock in the morning. And Holt, chief justice, held, upon a trial at Guildhall, that "*a die datus*" excluded the *day* of the date, but he said "*a datu*" or "*a confectiōe*" was from the act done, and so commenced the same time that it was dated or delivered; and Sir Thomas dying upon the last day, and the law making no fraction of a day, and the insurers being bound to insure the life of Sir Thomas for a whole year, and the year not being compleat until the day was expired, it would be a breach.

So, in the case of *Seignorett v. Noguire*, which was an action of covenant brought on articles of partnership for four years, and in the declaration, the articles were stated to commence “*with the day* of the date” of the contract; the articles, when produced, were to begin “*from* the day of the date” of the contract; the court said, that the variance was not material. And the chief justice said, that “*a datu*” did not exclude the date, and so was the same with “*cum datu*,” but that “*a datu*” and “*a die datus*” were not the same. But *Powel* said, that “*a datu*” and “*a die datus*” had been adjudged to be the same in the Common Pleas.

*Seignorett
v. Noguire.
2 L. Raym.
1241.*

Loosely and incoherently as the above case is reported, (the reporter having, as he mentions, lost his note book, in which the exceptions taken on this part of the above case were contained,) it is observable thereupon, that the chief justice distinguished therein between “*a datu*” and “*cum datu*” and “*a die datus*” holding that the two former did not exclude the date, but that the latter was different; by which observation it must be understood, that the latter did exclude the date in his opinion; and as to the observation of *Powel*, it is founded upon a case of which no traces are

are at present to be found, and may therefore be concluded to refer to a case in the Common Pleas, where these words were made use of as the *terminus a quo* a computation was to be made, in which case, the law would undoubtedly be as stated by him.

So, in a preceding case, it is clearly laid down, that "*a die datus*" is always exclusive of the day, the day itself being *there* excluded by the *express* words of the parties; and, in that, *Nevil*, the other *Powel* and *Treby*, chief justice agreed. I allude to the case of *Bellasis v. Hester*, which seems properly to fall within a branch of the law distinguishable from that now under consideration, but which I shall cite for the sake of the distinction there taken. That was a case where the *sight of a bill* was made use of as the *terminus a quo* the time, at which the payment of the bill was to be made, was to be computed. It arose on an action of *assumpsit* for 40*l.* the plaintiff declared as to part upon a bill of exchange for 20*l.* payable "*at ten days sight*," and that the bill was seen by the defendant, and accepted *the 5th of May*. The defendant craved oyer of the original, and upon that prayed, that the writ might abate, *quoad primum promissionem*; because the original bore teste the "*15th of May*,"

Bellasis v.
Hester,
1 L. Raym.
200.

May," and the bill was not payable until *ten days after sight*: The plaintiff demurred. It was argued on his behalf, on this part of the case, that if the bill were payable ten days *after sight*, the day of sight should be taken exclusive, by reason of the word "*post.*" But *Powel* and *Nevil*, justices, were of opinion, that the day in this case ought to be included, so that the day on which the bill was shewn should be reckoned one of the ten; for, according to *Clayton's* case, and all the books, where a computation was to be made from an act done, the day on which the act was done must be included, because, since there was no fraction in a day, that act related to the first moment of the day on which it was done, and was as if it were then done. But when the computation was to be "*from the day itself,*" and not "*from the act done,*" there "*the day,*" in which the act was done, must be excluded by the express words of the parties. As if a lease were made to commence "*a die datus,*" the day would be excluded; but if it were "*a confectiōne*" which was an act done, the day of the making would be included. But *Treby*, chief justice, held *contra*, viz that, if a bill were payable ten days after sight, the day of the sight could not be accounted one of the ten days, but should be excluded: First, Because it might be seen the

last minute of the day, and that might be intended as reasonably, as that it was seen the first minute: Secondly, The party might have the whole day to view the bill, and that was allowed him by the law: Thirdly, because the contrary construction seemed absurd; for then, *if a bill were payable* one day after sight, it must be paid the same day that it was seen, which was not the day after the sight as the bill required. As to *Clayton's* case, he admitted that it was good law, but not contrary to his opinion, for, if a man made a lease the first of *January*, to have and to hold "*a confefione*" for a year, then the day of the making must be accounted one, because, being a lease from the delivery, and to continue but for one year, unless the day were included, the lease would not determine until the first of *January* the next year, and so there would be two first days of *January* in the year. But, notwithstanding his opinion, because his brothers were of a contrary opinion, he awarded that the writ should stand, and that the defendant should answer over.

Cooper 718.

The court of King's Bench, in mentioning the preceding case, in their judgment in that of *Pugh* and the Duke of *Leeds*, refer to it with only this slight, yet singular observation, namely, "That it had been determined,

“ that in a note of hand payable *ten days after*
 “ *fight*, the day of the fight was inclusive.
 “ Why? because of the subject matter; that
 “ there should be no further time to make the
 “ demand; and *yet*, after the *day* and after
 “ *fight*, were precisely the same in language.”
 But we have seen, that those who decided
 that case were of a different opinion; for
Nevil and *Powel* distinguished this case, as
 falling within the rule applicable to cases
 where the *date* was the *terminus a quo*, in
 the strict sense of the word, *viz.* as signify-
 ing the act of delivery, admitting the
 difference of construction between “*a die*
 “ *datus*” and “*a datu*,” to which last they
 considered “*from fight*” as analogous; and
Treby, chief justice, held this case to be
 distinguishable *in its nature*, from cases of
 leases.

As to the case of *Thompson v. Vanbeck*, cited
 by Mr. justice *Aston* in that of *Pugh* and the
 Duke of *Leeds*.

Thompson v.
Vanbeck.
Cooper 720.

The question there is said to have arisen
 upon an action on the statute of usury. The
 declaration stated “*giving day of payment*
from the 26th.” Upon the evidence, it ap-
 peared that the bond was given on the 27th.
 The question was, Whether, as the declaration
 L. 1 2 stated

stated "giving day of payment *from* the 26th," this was a variance. This depended upon whether the word "*from*" should be construed *inclusive* of the 26th, or *exclusive*. Lord *Hardwicke*, (as the case is cited) said, "the computation is to be made from the *time* of the *act* done; and though there are a *variety* of constructions of the word "*from*," yet it depends intirely upon the *nature* of the thing, and that it should so depend, is the right rule; the consideration for the interest paid is giving day of payment, I think it includes the day, and my reason is, that it would be a strange construction to say, *that the day of payment should be antecedent to the time of advancing the money: So ut res magis valeat quam pereat*, it is *inclusive*." But this case, it was said, was never decided.

The preceding case is stated in so dark and unintelligible a manner, that it appears to me impossible to discover what was the real ground of Lord *Hardwicke's* opinion, or what could be meant by the expression, "that it would be a strange construction to say, that the day of payment should be antecedent to the time of advancing the money." But his Lordship *evidently* considered this as a case in which the computation was to be made from an act done, namely, the giving the
note.

note. And therefore, when he adds, "that there are a variety of constructions on the word *from*, yet it depended intirely upon the nature of the thing," he may *fairly* be considered as alluding to the usual distinction between these words, when applied to an act done, as the *terminus a quo*, a computation is to be made, and when, as the *terminus a quo*, an interest is to commence; and therefore, this opinion of his lordship, so far from being *adverse* to the doctrine I contend in support of, seems to have been founded on the *same principles*, and *decisively* in favor of it. Supra,

We come now to the last authorities that we shall cite upon this head, which, though, in fact, they arose long previous to several of the cases already mentioned, were reserved for this place, because they illustrate the distinction between the phrases, "*a datu*" and "*à die datus*," when referred to for the purpose of fixing the "*terminus a quo*," a thing is to commence in point of computation, and, when for the purpose of fixing the "*terminus a quo*," a thing is to take effect, or commence in point of interest. And as three of the cases, namely, those of *Bacon v. Waller*, *Cornish v. Cawsey*, and *Clayton's case*, were much commented upon in

that of *Pugh v. the Duke of Leeds*, I shall state them pretty much at length, as I find them reported, in order to shew that they by *no means* merited the censure, conveyed in the comments upon them.

Bacon v.
Waller.
1 Roll. Rep.
387.
Mich. 13 Ja.

The first case is that of *Bacon v. Waller*, wherein *B.* brought a replevin against *W.* The defendant avowed for *damage feasant*, for that the place where, &c. was his frank-tenement at the time, &c. The plaintiff said, that the defendant was seised of the land in fee, and leased it to *B.* the 26th of *May* such a year, by his deed bearing *the same date*, to hold "*from* the date" for thirty years. The defendant replied, that after this lease, namely, in *November following*, *B.* granted the land over to him, to hold "*from* the 25th of *May*" *the year before* for thirty years, by force of which he was possessed of it, and as yet was possessed and seised of the land, &c. Upon this replication, there was a demurrer. And it was contended, that here was a departure, and to prove it, the point would be, whether a lease to hold from the date, should be taken *exclusive*, or should commence the same day that it carried date: For if that should be taken *exclusive*, then, when *W.* whose lease was made the 26th day of *May*, carrying the same date, to hold
"from

“*from the date*” for thirty years *in interest*, granted that over, at a subsequent period, to hold for thirty years, “*from the 25th of May*” *by computation*, one day remained in him notwithstanding the grant, and so he had a reversion, and then the grant to the lessor was *not a surrender*, in which case, the defendant could not maintain his avowry; for he had not the frank-tenement *in present*, but had pleaded a new title from that in the avowry, namely, the title of an *under lease* from his own tenant, instead of a freehold which was a departure. And it is said, that the court, upon view of the *record in Fluellyns's case*, were of opinion, that the day was exclusive, and judgment was given for the plaintiff.

The preceding case is also reported, 3 *Bullst.* 203, but there the reporter has omitted to state the *fact* of the second lease being made a year after the first lease, (which was dated the 26th of *May*, *habendum* “*a datu*”;) to hold from the 25th *May* the year preceding. But the point in question is the same, and the cases of *Powel v. Nanney*, and of *Llewellyn v. Morgan* are there likewise stated; and it is there said; that Lord Chief Justice *Coke* observed, that the main and principal point was a lease made *habendum* “*a datu*” *et* “*a die datus*” whether they be all one or

Supra, 508.

Supra, 508.

not, and as to this the whole court agreed in opinion, *according to the judgment given in Llewellyn's case*, that the same was all one, that the avowry was good, and no departure, and judgment was given for the avowant.

Supra.

From the loose manner in which the reporters have stated these cases, it is rather difficult from either of them singly, to make out the precise point, and the judgment upon it. But, by the assistance of the two, that difficulty is entirely removed; for the original lease was made by him who had the freehold the 26th of *May*, bore date the 26th of *May*, and the *habendum* was "*a datu*" for thirty years. This lease being then to commence in *interest*, "*a datu*" must, (according to the law as laid down in *Clayton's case*, and in the cases of *Higham v. Cole*, *Osburne v. Ryder*, and *Hatter v. Ashe*,) commence from the delivery, and the day of delivery be included therein. Therefore, *that lease commenced the 26th of May, to hold for thirty years*. Then the second lease, which was made by the lessee of the first lease to his lessor, was made about *six months afterwards*, *habendum "from the 25th of May,"* in the aforesaid year, for thirty years. This lease, also, *then*, (according to the cases before cited, as to a lease to commence by computation

Supra, 508,
510.

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tion from a *particular day*) began on the 26th of *May* in the same year, to hold for thirty years. For it began from the 25th, which, both in computation and interest, (according to all the cases) excludes that day. Then, both the leases began the 26th of *May*, and both leases were for thirty years, *consequently*, no reversion was left in the under lessee, and *then* the second lease operated as a surrender to the first lessor, the tenant of the freehold; and then the plea of that lease supported his avowry, namely, "*that the place where was his freehold*," and so the cattle were damage feasant; for the lease being surrendered to him who had the freehold, was extinguished therein. Therefore; when *Rolle* reports, that judgment was for the plaintiff, he must mistake, for it was given for the first lessor: and that accords with the judgment as stated by *Bulstrode*, viz. that "*a die datus*," and "*a datu*" being the same according to *Llewellyn's* case, (in which case; they were held *so to be*, viz. both exclusive of the day, when used as the *terminus a quo* to compute from, and not as the *terminus a quo*, an interest was to pass) the avowry in the principal case was good, and no departure. The question consequently before the court, was, whether the 25th day was excluded in the second lease; which clearly, according to all

Supra.

all the cases it would be, being to *begin* from the 15th of May.

Supra, 484,
486.

If we recollect the difficulty the same court, consisting of the same members were in, and the great pains they took to get over the words "*a die datus*," as operating *exclusively* in an *habendum*, in the case of *Butler v. Fincher*, which occurred, *Hill. 12 Ja.* and that they *all* agreed that it could not be done; for that the construction of those words had been settled, and that they must operate *exclusively*, and defeat the lease, if it could not be helped by livery, although it was then admitted by *Dodderidge*, that, had the *habendum* been from the date, it would have been otherwise; we can *never* be led to believe, that sitting upon the *same question* in *Trinity term, 14 James*, they could hold, *without dispute or hesitation*, that the words *habendum* "*a datu*" and "*a die datus*" were the *same* in effect, (which would be a resolution diametrically opposite) if the premises from which the latter conclusion was to be drawn were the same, as those from which the former conclusion was drawn. Therefore, we must refer Lord *Coke's* words, in that case, to the same premises upon which the whole court founded their judgment; namely, the judgment in *Llewellyn's* case, which was a case

case of computation, and in which both phrases were settled to admit of, and require the same construction.

So where the plaintiff, in an *ejectione firma*, declared, that J. S. 5th May, 10 Ja. demised a house to him, *habendum* "from the feast of the Annunciation last past," for twenty-one years, "*ex tunc proximo sequente*;" and the defendant, the same 5th of May, ejected him. Upon *Not Guilty* pleaded, the jury found, that the said J. S., the said 5th day of May, by indenture, bearing date the 4th of May, demised the house to the plaintiff, to have and to hold, "*from the feast of the Annunciation last past*, for, and during the term of twenty-one years, *next ensuing the date thereof*, fully to be compleat and ended." And, upon that verdict, the plaintiff had judgment in the Exchequer, which was affirmed in the King's Bench; for the term began from the feast of the *Annunciation* in computation of the twenty-one years, and upon the 5th of May, in point of interest.

Moore v. Musgrave, cited Alleyn. 75. S. C. 1 Roll. Abr. 850. 11 Hob. 18, 19. Mich. Ja. 10.

Again, in an action of trespass against an executrix, the plaintiff declared of a lease made to the testator by indenture, made the 25th of March, anno , *habendum* "*a die datus*," for seven years, and, upon *nil debet*

Cornish v. Cawsey, Allen 75. S. C. Stiles 118. 1 Roll. Abr. 850. 12. Trin. 24. Car. 2.

debet pleaded, the jury found that the plaintiff, by indenture, dated the 25th of *March*, and delivered the *same* day, demised the land to the testator, to have and to hold, "from the *day* of the date," for the term of seven years, *from thenceforth*, "next," and "immediately" following, &c. And, upon this verdict, the question was, whether the lease, in point of *computation*, was to commence from the "making" or "from the day of the date?" for, if the seven years commenced "from the *making*," then the plaintiff had *mistaken* the lease, but if it commenced "from the day of the date," then he had declared right according to the lease. It was argued, that the seven years were to commence "from the day of the date," and not from the "making" of the lease, for that the words would bear that construction; because the words, "*from thenceforth*" might refer to the word, "*from the day of the date*," and *so* to the time of the commencement in point of interest. And then the words should be taken, as if the lease had been, "to have and to hold from the *day* of the date, from thenceforth for seven years," excluding the *day* of the *date* in the computation, and that was probably the intention of the parties; and not that the lease should commence on one day *in point of computation*, and the next day

day in interest : also, it was said, that there was a rent reserved during the term, payable annually upon the 25th of *March*, the last day of payment whereof, would be out of the term, if the seven years commenced upon that day. *Et per Rolle*, "the plaintiff hath mistaken his lease; for a lease *habendum*, "from *henceforth*," includes the day of the making, and a lease *habendum*, "from the day of the date," excludes the "day of the date:" and with this agrees *Barwick's* case, which he affirms to be law; (but he says, that if such *ancient* patents be given in evidence, the jury, by presumption, to make the patents good, may find that they were made the last instant of the day of their date, and then they were good in law: and, so it had been resolved, in point of evidence. Now, the *habendum*, here being "*a die datus*," and for seven years, "*from henceforth, &c.*" to make all parts of it stand, it must be construed to commence "*from henceforth*," viz. as to the *computation* of the seven years, that they should begin from the 24th of *March*; and "from the day of the date," viz. upon the 26th of *March*, in interest and possession.

But, in the preceding case, *Rolle* agreed, Supra 523.
 that if the lease had been made to have and to hold, "from the day of the date," from
 "henceforth"

"*bencefortb*" for seven years, as it was in *Musgrave's* case, then the plaintiff would have declared right.

Clayton's
Case, 5 Rep.
1. *supra* 498.

Again, in *Clayton's* case, which, as hath been said, was a question upon a lease, "*habendum from bencefortb*," in point of interest, Lord Coke, after having stated that instance, and the judgment thereupon, goes on and lays down the distinction between a demise "from the making," or "the day of the making," or "from the day of the date;" and, then his lordship observes, that it was adjudged in the Common Pleas, *Trin.* 21st *Eliz.* where the words of the statute, 27 *Hen.* 8. 16. of enrollments, were (within six months "*after the date*" of the said writings indented), that, if such writings had a date, the six months should be accounted from the "*date*," and not from the "*delivery*;" but, if they had *no date*, then the six months should be counted from the delivery; and then he cites *Dyer*, 5 *Eliz.* 218. the case of enrollments, and, that the *whole day*, should be accounted, in law, *the date* of the indenture, *in such case*; *unde sequitur*, says he, (i. e.) from those two cases of enrollments, (the former of which was an instance of a deed without date, and therefore, to be calculated from the delivery, the latter of which was a deed dated

stated, and therefore, to be calculated from the date), that, *in such cases*; namely, (cases of computation), *delivery* and *date* being the same, “from the date,” and “from the day of the date,” are all one sense; for, *as much as*, in judgment of law, “the date,” *in such case*, doth include *the whole day of the date*. It is plain, that the general conclusion of Lord Coke’s report of this case, cannot be carried further than this, that is, than to cases of enrollments, and the like, because the premises will not warrant so doing; for Lord Coke, has *before*, in the same report, stated Clayton’s case, wherein he holds, “*from henceforth*,” as analogous to the *time of delivery*, and that this *includes the day of delivery*; and distinguishes *that* “from the day of the date,” or “the *day of the making*,” which *excludes*, as he says, “the *day of the delivery*.”

And, as his lordship, 1st Inst. 46. where he again mentions the constructions of “*a datu*,” and “*a die datus*,” as the same in construction, cites Clayton’s case, and the case of enrollments, in *Dyer* and *Moore*, as the authority upon which he grounds that position; what he there lays down can be of *no authority*, further than, as it is *warranted* by those cases; and *then* it is of none at all as a *general proposition*,

Supra, 505.

proposition, but only as with relation to a *matter of computation* from a time past.

Pollard v.
Greenvill,
1 Ch. Ca. 10.
1 Eq. Ca. Abr.
342. Pl. 2.
162.

But if one having a power to make leases for twenty-one years in possession, make a lease to *A.* for twenty-one years, for the payment of *debts*, which lease is made from a time to come, and so not pursuant to the power, yet, being for what is deemed, in equity, a good consideration, it will be *there* supported.

Before we return to the consideration of the judgment of the court of King's Bench in the case of *Pugh* and the Duke of *Leeds*, it is necessary to advert for a moment to the meaning, or rather application, of the words "*inclusive*" and "*exclusive*," when made use of with reference to these leases; for much of the confusion that hath *of late* arisen upon this subject, seems to have proceeded from not having sufficiently considered the true meaning of these words in their application thereto. When it is laid down, as a position of law, that if a lease be made *habendum*, "*a die datus*," it is exclusive of the day on which it is made, and that if a lease be made *habendum* "*a datu*," it is exclusive of the day on which it is made, we are apt to refer exclusive and inclusive to the particle (*à*) or (from), considering that particle, *as the key*, to the sentence, and, so are led to conceive, that (*à*)
or

or (from), has no precise meaning, but is, *itself*, "inclusive" or "exclusive," as the case may happen to be ; whereas, "inclusive" or "exclusive," refer to "*day*," either expressed or implied. Thus, when we say, "*à die datus*," is "*exclusive*," we mean that the "*day* of the date" is excluded out of the lease ; so, when we say, "*à datu*," is "*inclusive*," we mean, that the whole or a part of the day on which the lease is dated is included therein : but the particle (*from*) is, *in both cases*, if the rights of third persons make it material to ascertain the *fact* or *thing* to which it refers precisely as the *terminus à quo*, *exclusive* of it. As, if a lease be, *habendum* "*à datu*," in point of interest, "*datus*," signifying, as there applied, an act, namely, the delivery, all time *preceding* the act of delivery, is excluded ; and the lease, *as to third persons*, takes effect from the *precise* moment of the *date*, (i. e.) *delivery* ; so, if a lease be, *habendum* "*à die datus*," (the day being there the thing referred to, from which the lease is to commence in interest) excludes all time previous to the determination of the *day* of the *date*, and differs from the former limitation, *only* in this respect, that the former takes effect *from* the "*time* of delivery," the latter, "*FROM* the *day* of delivery."

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To

Pugh v.
Duke of
Leeds,

To return to the judgment of the court of King's Bench. It is asked, "what is the date?" "the date," (it is answered), "is a memorandum of the day when the deed was delivered: in *Latin*, it is *datum*, and *datum tali die*, is delivered on such a day. Then, in point of law, there is no fraction of a day, it is an indivisible point. What is the day of the date? It is the day the deed is delivered; the date, and the day of the date, must be the same thing. The *day* of the date is only a *superfluous* expression. It is impossible, in common sense, to distinguish the one from the other." The ancient sages of our law, are charged in this judgment, "with having adopted a construction upon the word "*from*" against the sense of mankind, against convenience, and against justice, and founded upon subtleties, that even the schoolmen would have been ashamed of." I confess, there seems to me, to be more subtlety in the throwing together the half-dozen foregoing sentences, than in all the cases that have hitherto been cited upon this subject. We are told, "that the date is a *memorandum* of the day on which the deed is delivered, and *datum tali die*, is delivered on such a day; and, the day of the date, is the day on which the deed was delivered. The

" date,

“date, *therefore*, being also defined to be
 “the day the deed is delivered, the date,
 “and the day of the date, must be the same
 “thing.” But, if we carry this mode of
 reasoning as far as it will go, we shall see
 that there is no absurdity that may not be
 supported by it; for the date has also been
 defined to be a *memorandum* of the day on
 which the deed is delivered; and date is
 defined to be the day on which the deed is
 delivered; why then the *date* being defined
 to be a memorandum, and the *date* being
 also defined to be the *day* on which the deed
 is delivered, it might be contended with
 equal force, that a *day* was a *memorandum*,
 and a *memorandum* a *day*.

The argument says, that “the *day* of
 the date” is only a superfluous expression.
 “It is impossible, in common sense, to dis-
 “tinguish the one from the other. *Date*,
 “does not mean the hour or the minute,
 “but the day of the delivery. And, in law,
 “there is no fraction of a day. It is an in-
 “divisible point.” If it were true, that in
 law, there was no fraction of a day, there
 might be some plausibility in this kind of
 argument; but, if that proposition be un-
 true, the conclusion that is founded upon it
 cannot stand.

Clayton's
Case, 3d.
Resol. 5 Rep.
1. b.

It is true, that in questions between parties to a contract, the law presumes that an act done on any particular day, was done the first minute of that day: which is a *fiction* of law adopted for general convenience, and conformably to the ordinary usage of mankind, who commonly make their contracts from days, and not from hours or minutes. The law, therefore, in conformity to general usage holds, that where an indenture of lease is delivered at four o'clock in the afternoon, of the 20th of *June*, for a year, that this lease shall end the 19th day of *June*, in the next year; for the law, in this computation, doth reject all fractions and divisions of a day for the uncertainty, which is always the mother of confusion and contention.

But, fictions of law, hold only in respect of the ends and purposes for which they were invented; when they are urged to an intent not within the reason or policy of the fiction, the party interested may shew the truth. Thus, if a bond be made the 1st of *January*, and released the same day, the bond may be averred to have been made before the release. So, if a feme sole bind herself in a bond, and the same day marry, you may aver, that she delivered the bond before the marriage. If, on an assise,
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it appear, that the disseisin was done the same day on which the writ is tested, it shall not therefore abate; because the assise may be purchased after the disseisin. And, if a writ abate one day, and another writ be purchased, which bears teste the same day, the law will presume it taken out after the abatement of the first writ. So, where there was a robbery, 9th Oct. 13 Ja. it was alledged, in arrest of judgment, that the action was not brought within the year; for that there was but one 9th of Oct. within the year, and the 9th of Oct. 13 Ja. ought to be included within the year, and the 9th of Oct. 14 Ja. excluded: And then, the 9th of Oct. 13 Ja. was the day of the teste of the writ, *so the teste was not within the year.* But, *Hobart* and *Wynch*, Chief Justices, said, that it was not so; for a fraction of a day, *in such case*, was allowed. That was, that the robbery committed the 9th of Oct. 13 Ja. might be within the year of the bringing of the writ 9th Oct. 14 Ja. by the divisions of times in a day; for the robbery might be committed 13 Ja. in the *afternoon*, and within the year of the bringing the writ 14 Ja. in the *forenoon*.

4 H. 6, 7. 2.
17 Aff. 21.

Allen 34.

Norries v.
the Hundred
of Gawtry,
Moore 878.

And, *Hobart* said, in the foregoing case, that it had been adjudged, that if a lease were

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made

made *habendum, à confectiōe, ejectiōe firmæ* lay the same day, *because of the division of the parts of a day.*

Supra 492.
494.

Again, where, in the case of *Butler v. Fincher*, Lord Coke suggested, that it might be intended to make the livery in that case good, that the livery was made in the same instant of time that the first day did end, and so the lease be made good by such a favourable construction; *ut res magis valeat quam pereat*, and this, *especially*, where no time of livery made was found in certain. The court unanimously held, that no presumption could be made respecting the *time of day* of a delivery; for that the *precise* time, when it was made, whether in the *forenoon*, *afternoon*, or in the last *instant* of the day, was *merely a matter in fact*, and therefore, *not* to be taken by an intendment, one way or the other.

But the observation of the court of King's Bench, in their judgment now under consideration, "that in the case of *Cornish* and
" *Cawsey*, it was said, that if there was a
" question upon letters patent, like *Barwick's*
" case, to make the patent good, the jury
" might find, that they were made the last
" instant of the day; and that Sir *Eardly*
" *Wilmot*

“ *Wilmot* did so in a case that came before
 “ him, *viz.* he left it to the jury to find that
 “ livery was made the last instant of the day,”
 fully admits this doctrine, as to the pre-
 cision required in these cases, with respect
 to the moment of making the livery:
 for, why should Sir *Eardly Wilmot* have
 burdened the conscience of the jury with
 ascertaining the precise instant of the livery,
 when, *according to the principle now contend-*
ed for, finding the day would have been
 sufficient, that being (as alledged), in law,
 an *indivisible* point of time: That step was
 totally unnecessary; for it is impossible to
 come nearer a *precise* time, than to an in-
 divisible point of time: as, if a day, in con-
 sideration of law, be indivisible, it is, *quoad*
that particular purpose, in law, what an in-
 stant is to our perceptions, *viz.* the smallest
 modification of time that the law knows.
 Now, as the notion of time or duration is got
 by the perception of a succession of ideas,
 and the smallest portion of time we know of,
 is that, which, in our perception, admits no
 succession, and *therefore*, is to us indivisible;
 whatever exists in that portion of time oc-
 cupies the whole of it, and, *for that reason*,
 precludes further divisibility. Then, if a
 day be, in law, an indivisible portion of time,
 whatever exists in that portion of time, must,

in consideration of law, occupy the whole of it ; and *therefore*, any act that takes place in the course of a day must be considered as *existing* the *first* as well as the *last* instant of that day : Consequently, it was giving the jury a very unnecessary trouble to require them to ascertain the instant of the day at which livery was made, when a day, in law, was an *indivisible point* of time, and, therefore, if they found the livery was made on a day certain, they found, in law, that it was made the last instant of the day ; because the act of livery, in presumption of law, took up the *whole* day to do it in, and, therefore, was *in fieri* the *last instant* of the day, as well as the first instant.

But, so far is the law from considering a day as an indivisible point of time, when the interest of third persons requires that it should be divided, that, rather than a man's right should be lost, it even admits, for the purposes of justice, the possibility of two times in *one instant*. As if there be two jointenants, and one of them devise his share by will, this is held to be no severance of the jointure : Yet the title of the survivor, and that of the devisee, arise in one and the same instant, namely, the instant at which the devisor dies. So, if there be two jointenants
in

in a personal thing, and one of them commit suicide, the other shall have that by survivorship which was held in jointenancy; and yet, by the act of suicide, all the personal estate that the *felo de se* had, *at the time of his death*, is forfeited to the crown; but the law, to avoid doing injustice, supposes a possible division in that *instant*, and, in its contemplation, conceives a priority in favour of the survivor, *viz.* that, in that *instant*, his title by survivorship vests the thing in him, before the title of the crown by the forfeiture attaches on it.

It seems therefore, that the observation that, in cases of patents or of leases, the jury may, *ut res magis valeat quam pereat*, presume a livery at the last moment of the day, only applies to cases, where, from the *antiquity* of the instrument, the *actual* time of the livery cannot be proved; in which case, as the jury *must* presume and find a time, it is reasonable, that they should presume and find *such a time* as will support the instrument: But this presumption can never operate where there is positive evidence of the precise time of the fact; for the positive evidence must always controul the presumptive.

Now

Now *making* is to a lease for years, what *livery* is to a lease for life, and therefore, the *making*, in the former case, is a *fact*, as *livery* is in the latter case; consequently, if a lease for years were made under a power, and it became necessary to shew the precise time of the making, to ascertain whether it were in possession or reversion, if, from its *antiquity* or *any other circumstance*, that fact could not be ascertained, a jury might find such a making as would support the instrument. But, if the *actual* time of the making could be shewn, the *making* being a *fact* which the jury are to find, they must find the fact as it is, if it be a fact essential to the right of a third person.

Supra 441.

Another plausible argument used in support of the judgment in question is, that, in the case of the *Attorney General* and the Countess of *Portland*, all the leases from the civil-list act, down to the moment of that upon which the question was then in agitation, were searched, and they were nearly half the one way and half the other. Eighty were granted "from the date or making," and above seventy "from the day of the date," or "making;" all these leases had passed the great seal, and likewise the seal of the Exchequer; from this circumstance, it
was

was argued, “ that it was plain that the
 “ question turned upon the construction of
 “ the *English* words, and what sense they
 “ bore. If the court was right, nothing
 “ could be so *strong*, as *that all the officers of*
 “ *the crown who had been concerned in making*
 “ *these leases, looked upon the words as synoni-*
 “ *mous, and suffered them to pass and repass*
 “ *unnoticed*: It was demonstration, that by
 “ using both indifferently, they understood
 “ them to be both the same thing. *If there*
 “ *was nothing more in the question, than that*
 “ all the law officers concerned, had, in the
 “ above mentioned cases, considered the two
 “ expressions as synonymous, *that would be*
 “ *sufficient to guide the opinion of the court.*”

In answer to this part of the argument, it
 is only necessary to cite the observations
 made upon such an argument, from usage in a
 case precisely similar, *viz. Magdalen College*
case, as to powers of leasing under the 13 *Eliz.*
 It was there said, that after the act of 13 *Eliz.*
 divers masters and fellows of colleges, deans
 and chapters, masters or wardens of hospitals,
 and others, having spiritual and ecclesiastical
 livings had made estates and leases to Queen
Elizabeth, and to the king, that then was
 (in the manner therein contended against)
 which were granted over and transfered to
 many

11 Rep. 68.

many persons, all of which were made by the advice of men learned in the law, *and of the counsel learned of the king and queen*; and that the change of such a *common and constant opinion*, upon which the interests and estates of so many men depended, would be the occasion of *great vexation*, suits in law, and *the ruin of many*, who had not only spent *their substance*, or the greatest part of it, upon such estates and leases, but also laid out much *upon new building*, and other charges upon them, *all which* would be *utterly lost*.

11 Rep. 79

Sed per Justices Coke, Croke, Dodderidge and Haughton. As to the number of leases that had been made since the statute of *Elizabeth*, First, that it was more *ex consuetudine clericorum*, who imitated *precedents* of leases made before the 13th *Eliz.* than of any *sage advice of men learned in the law*. Secondly, that *multitudo errantium non parit errori patrocinium*. And as to the inconvenience, that was greater, and concerned more persons on the side the court decided in favour of, than the other.

Having gone through the arguments used in support of this judgment, and submitted to the reader such observations as occurred thereon, I shall leave this case, *only* making one observation more. There may be those who will charge me with having taken great pains

pains to subvert the principles of a decision, which has, at least, the merit of effectuating, in substance, the intention of the donee of the power, that otherwise would have been overturned. The answer I shall give to this charge, should it be made, is, that

“ T’will be *recorded* for a precedent,
 “ And many an error, *by the same example*,
 “ Will *rush into the state*.”

Shakespeare.

Before I quit that part of the subject on which I am treating, respecting the *habendum* in leases made under powers, I shall add a few general observations, as to those cases, where the duration of the lease is governed by the continuance of lives.

If a power be created to lease for three lives, it will be well executed by a lease for three lives, and the longer liver of them, because, for three lives, and for three lives and the longer liver of them is all one.

Alfop v. Pine.
 3 Keb. 44.

In the case of *Baugh v. Haynes*, one objection made to the lease was, that it was not made for three lives directly, but made to J. S. for the three lives of his three brothers therein named. *Sed per curiam*, that objection was of no force; for a lease to one for three

Baugh v.
Haynes,
Cro. Ja. 76.

three lives, and to three for their three lives, was all one.

Whitlock's
case, 8 Rep.
70. b.

It was agreed by the court, in *Whitlock's* case, that a power to make a lease for three lives, was not well executed in law, by a lease for ninety-nine years, determinable upon three lives. And the reason seems to be, that the estates are different, one being a freehold, and the other a chattel.

Rattle v.
Popham,
Strange 992.
Supra 365.

So, where, upon a marriage settlement, power was given to every tenant for life, when in possession, to limit the tenements in question, to any woman he should marry for her life by way of jointure, and in bar of dower : The tenant for life made a lease for ninety-nine years, determinable upon the death of his wife. And it was held, that, however she might be entitled to relief in a court of equity, yet, at law, it could never be said to be an execution of a power.

Whitlock's
case, 8 Rep.
69. b.

But a distinction is taken in *Whitlock's* case, where the proviso, creating a power to make leases, is in the beginning, general, absolute, affirmative, and indefinite ; as to make a lease or leases, grant, or grants, &c. as well in possession as reversion of hereditaments, &c. which is without any limitation,
and

and then a proviso of correction added; namely, that such lease or leases, grant, or grants, shall not exceed the number of three lives, at most, or twenty-one years; which clause is negative, and qualifies the generality of the first proviso; so that the power, by the first clause is general, and by the second qualified not to exceed three lives, &c.; and where the power is particular, entire, and affirmative; for, in the former case, the donee of the power may make any lease or grant, provided it doth not *exceed* the utmost extent of interest, that the power warrants: As, if he hath power to make *any* lease or grant, provided it doth not exceed the number of three lives, or twenty-one years; there he may make a lease for ninety-nine years, if three lives shall so long live, for that doth not exceed the number of three lives, but in truth is less; for every term for years, which is but a chattle, is less, in estimation of law, than an estate for life, which is a freehold: But, in the latter case, he must pursue the power, which is particular and entire; as, if one hath power to make a lease for three lives or twenty-one years, he cannot make a lease for ninety-nine years, if three lives so long live; for the power is to make a lease for three lives, or twenty-one years only; and a lease for ninety-nine years, if three lives live
so

so long, is neither a lease for three lives nor for twenty-one years; and, *therefore*, not warranted by the power.

1 Ld. Raym.
269. Whit-
lock's Case,
8 Rep. 70. b.

And such powers to lease, *habendum* for lives or years, may be either absolutely for one, two, or three lives, or for an absolute term of years, as for thirty years. Or they may be qualified, as for any number of years, determinable upon one, two, or three lives.

Fifthly, As to rent reserved on leases made under powers.

Vide Dougl.
Rep, 573.
Ld. Mans-
field's obser-
vations.

Upon this head of enquiry, it is necessary to premise, that the rules of law adopted in cases of ecclesiastical leases, and of leases made by virtue of the stat. 32 *Hen.* 8. as to leases made by tenants in tail, apply *equally* to leases made by virtue of powers in settlements. And therefore, the authorities decided on the former, equally apply to the latter.

Banks v.
Brown,
Moore 759.
S. C. Noy
110.

It was questioned, in the case of *Banks v. Brown*, whether the reservation of the ancient *copyhold* rent and more, in a lease made by tenant in tail, would answer the description of the ancient *accustomed* rent, within

within the stat. 32 *Hen.* 8. and it was held, that it would.

Upon a trial at law, directed out of the Exchequer Chamber, the case appeared to be this. Upon the 14th of *October*, anno 13 *Car.* 2. the Petty Cannons of St. *Paul's*, made a lease of the rectory of St. *Gregory*, for twenty-one years to *Morrice* and his wife, rendering 40*l.* a year. And *Morrice*, covenanted to pay, over and above that sum, a couple of *capons* yearly, or six shillings and eight pence in money. It appeared upon evidence, that, in a former lease, made divers years before, there had been only twenty-five pounds a year rent reserved; that, in another lease, there had been thirty seven pounds a year reserved; and, in another, eight and thirty pounds *per annum*; but, in the last lease of all, precedent to that in question, forty pounds *per annum* had been reserved, and a couple of *capons*; and it was found, that the exceptions out of the other leases, were more large than those out of the lease then in being. And the question was, whether the last lease was good in law? And it was held, by *Hale*, Chief Baron, that the accustomed rent mentioned in the statute, ought to be understood of the rent reserved upon the *last* lease, and not upon the first;

Morrice v.
Antrebus,
Hard. 325.

for *that* rent having been altered since, could not be called the accustomed rent.

Per Holt, in
Orby v. Mobun, 3 Ch.
Rep 66. S.C.
Pre. Ch. 257.
1 Vern. 531.
542.

Lord *Holt*, upon the authority of this case, delivered it as his opinion, in the case of *Orby v. Mobun*, that if a power were to lease, reserving the ancient and accustomable rent, this should be understood that rent, which was reserved at the creation of the power, if a lease were *then* in being; or that which was last *before* reserved, if no lease were *then* in being: for he who created such a power, intended no more, than that the lessor and lessee should not be able to put the estate in a worse condition, than it was in when the power was created, but should keep it in the same plight and condition, at least, as it was in, when so settled. Therefore, he said, that suppose, anciently, there had been a variety of rents reserved; as for instance, 10s. for many years before *anciently* reserved; and 20s. some years before the settlement; and, at the time thereof, the lands were not in lease: In that case the 20s. and not the 10s. though a much ancients rent, should be the ancient rent; for the length of time, in that case, was not material. The ancient rent, in such case, was not to be taken in respect of time past, but of the time to come. In such case, reference must be

be made to the lease that was in esse at the time of creating the power, or *that* last before in being at the time of such settlement; and the rent thereon reserved, was the ancient rent, in respect of any lease to be made pursuant thereto. As if a lease had been made four years *before*, at 4*l.* and another were made *then*, reserving the ancient and accustomed rent; that lease of 4*l.*, in respect of the lease to be made, which was *then* a *future* act to be done, was ancient, and the rent thereof, was *old* rent, in respect of the *new* lease. He would suppose a variety of reservations of rent at several times, as 10*s.* forty years ago, and 20*s.* twenty years ago; yet, the *last* reservation of twenty shillings, must be the ancient rent; otherwise such a power could not be executed: And therefore, *ex necessitate*, it must be brought to some certainty, (as he had done), to know what was intended by these words, *ancient, usual, and accustomed rent*. The reason of the law was with him; and for this, he depended upon *Morrice* and *Antrobus*, which he said, was an undoubted authority, and could not be shaken; and it would be no answer to say, that *ex necessitate*, such a construction was made there, because it was an ecclesiastical case: And, that a Dean and Chapter, once reserving a greater rent than formerly, could

never diminish it again ; but tenant in fee-simple, might make leases at 50s. and, afterwards, at 10s. and *then* make a settlement; as had been done in this case: What *then* should the 10s. or the 50s. be the ancient rent? he held, that the 10s. should be it; for *maius* and *minus*, would not be any alteration of the case, nor did vary it in one way or the other: If a Dean and Chapter might increase, but not diminish, because the statute restrained them, this was not the case of tenant in fee-simple, who had an absolute power to diminish. And, what he, at the time of the settlement made, thought was a rent sufficient, should, upon a power reserved to him over his ancient estate, be the measure of his intention. And his lordship said, that, without a certainty, the power could not be executed, even by reserving a sum in particular; and *therefore*, he gave it as his opinion, that, upon any settlement, where a power was reserved to the tenant for life to make leases of the lands, in that settlement, (which were anciently and accustomedly demised, and whereof fines had been taken), at the ancient, usual, and accustomed rent, for three lives, or one and twenty years, or any other number of years, determinable on three lives, *that rent* which was *then*, or, *last before* reserved, upon a lease in being,

being, of the same lands, or on a lease which expired last before the time of the settlement made, must be the sum, and no other.

But Lord *Cowper*, in the same case, doubted, as to this point, and suggested, that, suppose lands were leased once at a greater, and twice at a lesser rent, he took the rent of the former lease to be the ancient rent; the last lease might be made by him that had the fee, who was not bound to reserve the ancient rent, but might let it for nothing if he pleased. So, his lordship thought, this rule likewise could not apply to lands anciently demised, whereof fines had been taken; for there the rents were more or less, as the fines were higher or lower.

3 Ch. Rep.
73.

However, both these opinions seem to be maintainable under different circumstances; for it appears to be very reasonable, that, where lands have been usually letten at rack rents, the rent that was last reserved upon leases preceding the creation of the power, should be understood to be the rent alluded to by the creator of the power, when he refers to the ancient reservation, as the criterion, by which a new reservation is to be governed: For, it is not to be supposed, that, when the owner of an estate farms it

out on leases without fines, he will not reserve the best rent that can be had; and, therefore, as some certain rule must be resorted to in such case, there seems no better premises on which to found one, than by resorting to that rent as the criterion, which the creator of the power himself has estimated to be the value of the land; for if Lord *Cowper's* mode of reasoning be adopted, then if there be three leases in succession, the two preceding ones of which are at a low rent, and the latter of which, is at a high rent, the *low* rent will be the ancient rent, and, consequently, the measure by which the rent under the power is to be governed. And this, it seems reasonable to think, is not the intention of the creator of such power. And, if the power is to be expounded, to mean the best rent ever reserved for the premises, *from what period* are we to take up our calculation of the best rent? Besides, the value of property is continually fluctuating, and, therefore, it may be impossible to procure a rent equal to a very ancient rent, but the probability of fluctuation is small, where the criterion is the rent last reserved. But if the owner of the freehold, in the exercise of his ownership, has not let his lands at the rent they are worth, but contracted, in part, for gross sums by way of fine, it appears

pears reasonable, that, in such cases, the last rent reserved, where no fine was taken, should be the criterion to go by.

But it seems, that, if the custom of the country, where the lands lye, be to lease partly on a rent, and to take a fine for the remaining value, then Lord *Holt's* mode of ascertaining the ancient rent is most reasonable, even in this case.

So, if such power be to lease, reserving so much yearly rent, or more, as hath been *most accustomably* yielded or paid within twenty years next before such lease thereof made, the rent reserved within the twenty years, must be the measure of the reservation upon leases, made by virtue of such a power, although a greater rent hath been reserved before the twenty years.

But, if several rents have been reserved within the twenty years referred to, Lord *Holt's* rule seems, in that case, the most proper to go by, unless the leases, on which the rent has been reserved within the twenty years, have been sometimes with fines, and sometimes without; in which case, Lord *Cowper's* rule seems best.

Right on the
demise of Bas-
set v. Thomas
Supra 399.

Where lands have been usually leased for lives, and the usual profits made by fines, tenant for life under a settlement, (with a power to lease such lands, so as upon such lease, there should be reserved so much or more yearly rent, as there was, or had been, given or received for the premises within twenty years then last past, or a proportional rent, where a greater or lesser *part* of any farms or tenements, &c. should be demised, &c.) shall not be obliged to let the lands at a rack rent, but may demise upon reserving the usual fines and rent; for, if they were obliged to let the lands at a rack rent, it might be quite inconsistent with the nature of these estates.

If a lease be made under such power to demise rendering the *true* and *ancient* rent, and the rent reserved be not conformable to *that* both in *quality* and *quantity*, and *manner* of reservation, the lease will be void.

Mountjoy's
case, 5 Rep.
3. b.

Thus, it was resolved in *Mountjoy's* case, 5 Resol. that if rent *anciently* payable in gold, were, in a new lease, under a power so restricted, made payable in silver, such lease would not bind; for the variation might be prejudicial to the remainder-man by the fall of the value of silver. And, though the
2 same

same might be said, although it were reserved in gold, as it had before been, that was no matter; for, by continuing the species of reservation formerly made, all the precaution the power required, was used, and the subsequent fall could be no ways imputed to the donee of the power.

But, if a quarter of corn were anciently reserved, and such a lease be made reserving eight bushels of corn, this will be good; for it is all one in quantity, value, and nature, and varies only in words.

Mountjoy's
case, 5 Rep.
3. b.

It is said in *Mountjoy's* case, that, if tenant in tail be of two farms under a settlement, one of which has been always let at 20 *l.* rent, and the other for 10 *l.* rent, he may not, by virtue of such power, make a lease of both for twenty-one years, rendering an entire rent of 30 *l.* This question was agitated in the case of *Smith v. Tinder*, where it appeared upon evidence, that lands demised under the statute 32 *Hen. 8. c. 28.* "respecting
"leases of lands, whereof a husband is seised
"in right of his wife, &c." were anciently in lease and occupied by two tenants, the one paid sixty pounds, and the other one hundred and eighty pounds, and so both paid two hundred and forty pounds yearly rent only;

Ibid. 5.

Cro. Car. 22.

only ; and that the husband had now joined them in one lease, and reserved two hundred and eighty pounds yearly, which was *more* by forty pounds a year than both the leases produced before ; and the question was, Whether this were a good lease within the statute ? But the cause was ended by arbitration.

But the point was resolved in *Mountjoy's* case, 5th Resol. against the validity of such lease ; for the intent of such reservation is, not only that the old sum of money shall be reserved, but that it shall be issuing out of the old land. And though this be only *obiter* said there, yet, if such lease had been legal, it would have over-ruled that case ; and *therefore*, although not the case *in terminis*, it was *tantamount*.

Read v. Nash
1 Leon. 147.

Improving the estate will not be considered such an alteration as varies the rent, by making it to issue out of other hereditaments, than those contained in the power. Thus, where tenant for life, with power to make leases, whereupon the old and accustomed yearly rent should be reserved, entered and built a new house upon the land, and then made a lease for twenty-one years, reserving only the ancient rent, &c. It was contended,

contended, that this could not be said to be the ancient rent, because part of it was issuing out of the new house. But the court would not suffer it to be argued, and held the rent to be well enough reserved.

If a power to lease be, provided that two parts in three of the improved value be reserved as a rent, the reservation may be made in the terms of the power; and the constant payment of *such a sum* as amounted to that, at the time of making such lease, will be good, whether the tenements that are the subject of it rise, or fall, in value.

Thus, where *A.* had a power under a settlement to make leases, for a provision for any younger children he should have, or otherwise as he should direct; a lease was made by *A.* to *B.* for ninety-nine years, if three persons, children of *A.* should so long live, in trust for *C.* paying yearly so much rent as amounted to two parts in three of the yearly value of the said premises, according to the best improved value. And, on a bill brought to set aside this lease, it was objected, on the part of him in remainder, that the rent reserved was altogether uncertain, and lay only in averment; and, that if the value averred by the plaintiff, should, in the least,

Audley v.
Audley, 2 Ch.
Rep. 82.

least, be disproved, the remainder-man would be non-suited in any action. And, it was insisted, that it was proper for the Court of Chancery to fix and establish that for a standing rent, which could be made out to have been two parts of the best improved value at the time of making the said lease, and that the rent, so to be ascertained, the defendant might covenant for a constant payment of. But, it was held, that this lease was good and sufficient, and that, unless proof were made of a greater value than the sum which had been constantly paid and accepted of by the remainder man, the said sum must be taken as two parts of the full value of the premises at the time of making the said lease; which, or the greater value, if so proved, was to be continued to be paid, whether the premises rose or fell in value. And decreed accordingly.

But, in general, it seems necessary, that the sum intended to be reserved under such provisos in private settlements and conveyances, should be *specifically* stated in the lease; for, otherwise, the remainder man may be put to infinite trouble, vexation and expence. It hath therefore been held, that the reservation may not be made in the same,
 or

or as general terms, as the power itself is ; as, by simply *transcribing* the clause respecting the reservation of the ancient and accustomed rent, &c. in the instrument creating the power to lease, into the lease, leaving the necessity of averring and proving, what was the ancient and accustomed rent to the tenant for life, or remainder man.

Thus, where a power was reserved to the successive tenants for ninety-nine years determinable upon their lives, under a settlement, that as and when every of them should come into, and be in possession of, the hereditaments settled, it should be lawful for them from time to time, during their lives, by indenture under their respective hands and seals, to lease all and every or any part thereof to any person or persons for any term or number of years, not exceeding twenty-one years, or for one two or three lives, or for any term or number of years determinable upon the death of one, two, or three persons in possession, but not in reversion, remainder or expectancy ; so as upon every such lease of such parts of the premises, as had been *anciently and accustomedly* demised, whereof fines had been usually taken, the *old, usual, and accustomed yearly rent or rents, or more,* should be yearly reserved and made

Dutcheſs of
Hamilton, et
al. v. Mor-
daunt, et al.
3 Brown's
Par. Ca. 248.
S. C. by the
name of Orby
v. Mohun,
Gilb. Eq.
Rep. 45.
Pre. Ch. 257.
2 Vern. 531.
542. 1 Eq.
Ca. Abr. 343.
5. 3 Rep. Ch.
56. 2 Freem.
291.

made payable, during the continuance thereof respectively ; and so as, upon every lease of *such part* of the premises, as *had not* been *usually* let, and for which there *had not been any fine or fines* formerly taken, there should be reserved and made payable, during the continuance of the same respectively, the *most* and *best improved* yearly *rent* that could be reasonably had or obtained for the same ; and so as no such leases should be made punishable of waste, and so as the lessee and lessees to whom the same should be made, should respectively seal and deliver counterparts thereof. A tenant in possession for ninety nine years under the settlement, being desirous to make leases for the benefit of his family, and seized with a sudden indisposition, when he had no rent rolls or old leases to guide himself, as to the reservation of the old rents (all or most of them being in the remainder man's hands, who refused to deliver them) made a lease by indenture of all the hereditaments, comprised in the settlement, which had been *usually letten*, and *fines taken* for the same ; and of all other lands which were within the compass and intent of the said power, and every part thereof, to hold for the term of ninety-nine years, if three persons therein named, or any of them should so long live ; so as the lessees should seal
and

and deliver a counter-part of such lease; *yielding and paying* therefore during the said term, at, and upon, the days and times in that behalf used and accustomed, *the several and respective old accustomed rents reserved and payable* for the said several messuages, tenements; and farms thereby leased, according to the intent and meaning of the said proviso. And also another lease, whereby *part of the premises*, for which *finer had not been usually* taken, and of which there was *then* no lease for years, or for any life, in being, were leased to hold for 99 years, if three persons therein named, or any of them should so long live, *yielding yearly*, during the said term, *such sum and sums of money*, as should amount to the *most and best improved yearly rent* that could be *reasonably had and obtained* for the *same*.

The tenant, for 99 years, died shortly afterwards, and on a bill, filed by the lessees, against the remainder-man, &c. to have these leases established; the question upon them was, whether they were well executed, pursuant to the requisition of the power?

On the hearing, the latter lease was given up by the lessees, "*a reservation of the most improved rents, &c.*" being so uncertain,
that

that they could not contend in support of it, at the bar. And the former, after a hearing before Lord Keeper *Cowper*, assisted by the Lord Chief Justice *Holt*, and Lord Chief Justice *Trevor*, was held, by the Lord Keeper and *Trevor*, against the opinion of *Holt*, not to be warranted by the power, and decreed accordingly.

This opinion was acquiesced under for twenty-years, and then an appeal was brought into the house of Lords. And, as the arguments there used, give a clear and concise idea of those used by the judges on the hearing, I shall state them fully as they appear upon the case.

The objections to the lease were, First, That it ought to have mentioned the *particular rent* reserved. Secondly, That the ancient and accustomed rent was thereby reserved, as well for lands, not anciently leased, as for those that were, and that *therefore*, it was contrary to the meaning of the power.

As to the first objection, it was argued, that the specifying a certain sum in the reservation of a lease, was clearly not necessary, if the particular rent intended might be known by proper reference: *Certum est, quod cer-*
sum

tum reddi potest, was an undoubted maxim, both in law and reason. What those ancient rents were, was a matter of fact, capable of being known, and without difficulty, by those who had the writings of the estate, and had been fully ascertained by the plaintiff's in the original cause. That the reservation was in the same terms with the power, and consequently, was pursuant to it. That the plain meaning of the restriction in the power was, to secure the ancient rents to the remainder-man. If he had these, he had all that was intended him, and there could be no doubt, but that he would be entitled to them by this reservation. But there was no appearance in the settlement of any intention in the parties to have those rents ascertained in any particular manner. That it would hardly be doubted, that such a reservation of rent by the owner of the fee, would be good, which, it could not be, if it had not such a certainty as the law required; and it did not appear, that there was any design in the maker of the settlement, to exact a greater degree of certainty in this respect, than what was required by law. That the intention and endeavours of the tenant, under the settlement, to execute this power in the fullest manner in favor of the heirs at law, was manifest; and the defect, if it was

any, ought to be supplied by a court of equity; especially, if the same was occasioned by the agents of the remainder-man, in neglecting to shew the tenant for 99 years, the proper evidences to ascertain this rent; for it seemed contrary to conscience, that the remainder-man should gain by his own wrong, especially, when he himself was a stranger to the family, and a volunteer, and would deprive the heirs at law, (notwithstanding he had got all the residue of the estate, to the amount of near 150,000*l.*) of that small interest, in their father's and grandfather's estate, which was given them in lieu of the whole, which ought to have descended to them.

As to the other objection, it was argued, that the demise in the words of it was several, and to put this construction upon them, would be to make them joint, contrary to the plain words and intention of the lessor. That the reservation, of the several and respective ancient rents, for the several and respective messuages, &c. could not mean any thing but such rent, for each tenement, as was anciently reserved for the same, and it would be difficult to use plainer and stronger words to import the meaning. That the words yielding, therefore, must be understood,
reddendo

reddendo singula singulis, and which method of interpretation, the law prescribed in many instances, not so strong as this. So, that, as to those parts of the estate demised, if there were any, which had no ancient rent, no rent was reserved by this reservation, and *consequently*, as to those, the power was not executed.

On the other side, it was insisted, that, as to the lease upon which the rent reserved was mentioned to be *the most improved rent*; this reservation was plainly void for the absolute uncertainty of it: consequently, this lease was not warranted by the power, and was accordingly given up at the hearing by the counsel for the lessees. And, as to the other lease, *under the several old and accustomed rents* reserved, and payable for the said hereditaments, this was also void, as against Lord *Mobun*, the remainder-man, and not warranted by the power; because there being many farms, and a great estate within this lease, some let at the ancient rents, and some not, it would put insuperable difficulties upon the remainder-man to recover his rent due for the premises comprised in this lease; for, that, in the actions or avowries to be made for the rent, he must be so lucky as to point out *what was the*

old rent, for what, and for how much land it was paid, and at what time payable. And, if a tenant could prove, that a *different* rent was paid for the land, or that any other land was comprised in the lease, or that the rent was formerly payable at any other day, the remainder-man could not recover; but instead of recovering the rent from the tenant, must, from time to time, pay him costs. Whereas, it was intended, that the remainder-man should have as plain, certain, and easy a remedy for his rent, as other landholders have, and, as the former holders of this great estate anciently had: but, upon the lease in question, it neither appeared what the rent was, which the remainder-man was to have, nor for what estate the rent was to be paid, nor when, or on what day it was to grow due, the lease giving the remainder-man, no manner of light, as to these particulars. That the proviso contained in the power of leasing, in directing that the tenant should seal a counterpart of every lease, shewed, that the intent of the power was to guard against all the foregoing inconveniences, by reducing the premises to a certainty; and, that there should be a counterpart of every several lease of every parcel of land which was formerly let separately, and the particular ancient rent reserved

reserved with certainty in each lease; and not one lease only, or a counterpart of the lease of the whole estate, without reserving any certain rent. That, as these powers of leasing were generally reserved in all settlements, if so loose an exercise of them should be allowed to the tenant for life, it would introduce the greatest difficulties, and put the greatest hardships upon the jointress, sons, and other persons, claiming in remainder under such settlements, and, by such a construction, the tenants for life, by an uncertain, general, and short lease of the whole estate, which might be a rash and sudden act, and done with very little expence of money, time, or trouble, would be enabled to render the remainders expectant on the determination of such lease, though settled on the highest consideration, to become of little value, because the persons to whom such remainder belonged, would be in a great measure disabled from recovering any rent from the hereditaments.

And, after hearing the opinions of the judges, upon a question proposed to them, “whether the power in the settlement to make leases was well executed?” *the appeal was adjudged to be dismissed, and the decree therein complained of affirmed.*

Levison v.
Pigot, cited
3 Ch. Rep.
61. 76.

This rule appears to admit of an exception, if the quantum of rent be, by the settlement, referred to be ascertained by something which is in itself absolutely certain; for then a reservation in the terms of the power will be sufficient. As where a power, reserved by a settlement, was to make leases of lands anciently demised, reserving 12 s. for every *Cheshire* acre. A lease was made thereupon of all the lands anciently demised, reserving *all the* rent intended to be reserved. And upon a trial in the King's Bench, where the tenant was plaintiff, he recovered, notwithstanding that the reservation was in such general terms; because in this case, there was an absolute mathematical certainty, than which nothing could be more certain; for the power provided that at least 12 s. should be reserved for every *Cheshire* acre, and the lease referred to the words of the power.

And, if the lease be of lands subjected to a power, together with other lands not so subjected, and there be equivocal words, under which the reservation of the rent may be referred to the premises, on which the power attaches, and the lease cannot take effect, unless the rent be to issue out of those premises; then the better opinion seems to be,

be, that the reservation shall be taken as referable only to the premises, subjected to the power, and by that means the lease be made good.

Thus, where a power was to let leases of five acres, for twenty-one years, reserving the ancient rent, which was six pounds *per annum*. A lease was made of those lands, *inter alia, habendum* for twenty-one years, reserving *proinde* six pounds *per annum*; it was excepted to this lease that, *inter alia demisit* the five acres *reddendum et solvendum proinde, &c.* was not a good reservation; for that "*alia*" might be somewhat out of which a rent was not issuable, or, if it were rentable, then the rent must be apportioned, and so would not be the ancient accustomed rent reserved for the five acres. But, as to that, it was said, it might be intended that the "*inter alia*" might comprehend nothing but such things, out of which a rent could be reserved, and then the six shillings was reserved only for the five acres. However that the "*proinde*" might reasonably be referred only to the five acres, and not to the "*inter alia*," and that a distinct reservation of six shillings might be for five acres. And judgment was given accordingly.

How v.
Whitfield,
1 Vent. 338.
339. S. C.
2 Show. 57.
T. Jones 110.

Supra 124.
Supra 254.

In the report of the preceding case, as made by Sir Thomas Jones and Shower, the parties seem to have waived this objection, and to have rested the case upon other grounds. But, the opinion, as to this point, seems well warranted by *Clere's* case, 4th point, and *Scrope's* case, and to fall under the same principle; for the word "*proinde*" might indifferently refer to the whole, or to a part of the hereditaments in question, and the question being to which the lessor meant it to refer, and it appearing, that if he meant it to refer to the whole premises, the lease would be void, but, if it only referred to that part of them which were within the power, then it would be good, the true rule of construction was, that the lessor could not have meant to use the words, but in that sense which would support his deed; *in which sense*, they were capable of being taken; and so, *ut res magis valeat quam pereat*, they must be taken to refer to the five acres only.

Winter's case
Dyer 308. b.
Pl. 75. it vide

It seems, that several leases may be made in the same deed, under such a power, if the reservations be several and certain. Thus, where a lease for a term of years was made of the manors of *A. B.* and *C.* by indenture, rendering annually to the lessor, his heirs, and assigns,

assigns, for *A.* 10*l.* for *B.* 6*l.* for *C.* 4*l.* at the feast, &c. and payable at one place out of the manor, with a condition to re-enter into the said three manors for non-payment of the same rents, or any of them, or any part or parcel of them, within a month after the said feast, &c. The lessor entered upon the lessee into all the three manors, for rent of one of the manors in arrear; and one point was, Whether the several reservations of the rent were several tenures, demises, reversions and rents, and to be avowed for severally? And *Manwood*, *Morison*, and *Harper*, held that they were. But *Dyer* held not, because they were not divers leases, but one lease to one person, and one limitation of an estate; and consequently, that there was but one reversion to which the rent was incident; and, that, therefore, the several reservations of several rents could not change the nature of the reversion which was the principal, the rent being only accessory. So *quære*.

Tanfield v. Rogers, Cro. Eliz. 340. et S. C. cited, Gilb. Rep. Eq. 47.

But, if, in such case, the reservations have reference to the whole, subsequent words (under a *viz*) apportioning it, will not sever the rents, and make such a general reservation good, because, the reservation being in gross at first, and the apportionment afterwards under a *videlicet*, this does not make

Knight's case
5 Rep. 54. b.
et vide
Mountjoy's
case, 6 Resol.
5 Rep. 6. a.

Supra. 567.

a severance of it, but amounts only to a several declaration of the several values of each parcel, by which it appears, how and for what rates the whole rent is reserved. And, if there should or might be an apportionment in such case, that would not help the lease or make the reservation good ; for, if *verus et antiquus redditus* be not reserved yearly during the lease, by the deed, the power is not in such case pursued. And that was held to be the effect of such a limitation in *Knight's case*, where a lease for years was made of divers houses, yielding the rent of 5*l.* 10*s.* 11*d.* at four feasts in the year, *viz.* for one house, 3*l.* 11*s.* for another 20*s.* and for the other houses several rents, residue of the said rent of 5*l.* 10*s.* 11*d.* So observe the distinction between this case and that of *How v. Whitfield*, where the court held, that upon the construction of the words there, as used by the lessor, the *versus et antiquus redditus* was reserved, *viz.* 6*l.* annual rent for the five acres.

And, if there be a difference as to the time of the payment of the rent, so that it be not payable at the same periods as anciently, that will vitiate a lease under a power restricted to be made, rendering the *true* and *ancient* rent. Thus, a reservation of the
rent

rent at two days, where the rent was formerly reserved and payable at four days, was held, in *Mountjoy's case*, to make the grant and render void; because it was *ad nocumentum* of the heirs in tail, which was restrained by the statute that created the power; for, it was *more beneficial* for them to have it paid at *four* feasts than at *two*. And all beneficial qualities of the rent ought to be reserved and observed.

Mountjoy's Case, 5 Rep. 3. b. 4 Resol.

In this respect, leases under powers in settlements, differ from ecclesiastical leases under 13 *Eliz.*; for, in them a reservation at *two* days, when the rent was payable *formerly* at *four* days, does not vitiate the lease, because the statute does not avoid such lease, *if the accustomed yearly rent or more* be reserved. So note the distinction.

Baugh v. Haynes, Cro. Ja. 76. Dean of Worcester's case, 6 Rep. 37. b.

And the whole rent must be payable annually during the whole term; for, the intent of the donor is not answered, unless a continual revenue be yearly payable *by compulsion of law*, and not in *expectancy* or in *futuro*.

Vide 1 Burr. 121. 5 Rep. 2 *Elmer's case*.

But, if a man hath a power to make leases reserving the ancient yearly rent annually; yet, if it were reserved upon a day before the

Said by Powel, arguing, and agreed to by

Holt, 2 Lord
Raym. 1198.

the year was up, as if the year ended at *Christmas*, and it should be reserved at *Michaelmas*, it would be well, pursuant to the power.

It is not necessary in a lease, made under a power, restrained to be, rendering the *true* and *ancient rent*, to reserve heriots or the like; for, these are casual and accidental services, and therefore, not falling within the meaning of such restriction.

Baugh v.
Haynes,
Supra, 392.
541. Cro.
Ja. 76. et
vide Banks
v. Browne,
Moore, 759.
Supra,
et Coventry
v. Coventry,
Comyns 312.

Thus, in *Baugh v. Haynes*, where it was objected, that the heriot was not reserved, and so *all* the services was not reserved; the court resolved, that the non-reservation of the heriot should not impeach the lease; for, the statute 32 *Hen. 8.* was, that the ancient rent or more should be reserved; which was to be intended of the ancient rents, and did not extend to casual and accidental services, as heriots and the like.

And, although, in common law conveyances, no rent can be reserved but to the lessor, donor, or feoffor, and his heirs, who are privies in blood, and not to any who is privy in estate, as, to him in reversion, remainder, &c. yet, in these cases of powers, the reservation by tenant for life is good, and shall enure as rent to the remainder-man,
and

and he may distrain for it : For these powers take effect through the medium of the statute of uses, which executes the possession according to the limitation of the use. And such lease, when made, takes effect out of the uses of the settlement by which it is created.

Thus, one question, in *Harcourt's* case, was, Whether the words of the reservation did not make that which was there called a rent, to be only *a sum in gross*, and *not* rent; and so turn the reservation of rent into a condition? And, as to that, it was contended, that the reservation there was, *as to the remainder-man*, a condition, and the rent a sum in gross, and not rent; and that, by consequence, it could not enure as a reservation of rent; for, the lessor had but an estate for life when he made the lease; and, though, when he made the lease reserving rent, that should be a rent during his life, for that he had a reversion, and, by the common law, might make a lease reserving rent during his life; yet, that tenant for life should let land *that he had for life*, and reserve rent to continue *longer*, could not be supported upon any ground of law; and, for that reason, the rent there reserved, and the nature of rent, and of a reversion, ceased

Harcourt's
case, Ander-
son 273.
Supra, 435. •
479.

by the death of tenant for life ; and, therefore, it was said, that when he died, then those who had the immediate remainder, should have the sum of money mentioned to be reserved, as a sum in gross by the limitation of the use, and the reservation should not continue as such, but should be taken as it lawfully might, namely, as a condition. But, it was, notwithstanding, agreed by the court, that the land was distrainable for it as for rent, and that it was not a payment upon condition; one reason for which was, that it was not *the intent* of those who were parties to the indenture to make it a condition, but rather to make *a limitation* of the rent for the uses aforesaid; and that it could not ensue the nature of a condition, for it could not be taken as a condition at common law, because that those in the remainder were mere strangers to the condition; and a condition united to the *use* of the term it could not be; for that, if it were so, he in remainder, being a stranger, could not in law take advantage of it: But, if it were rent, he immediately in remainder might distrain for the rent when it incurred due, by reason of the statute 27 *Hen. 8.* of uses, by which it was enacted, *that the intent of the parties should be observed.* Therefore, if
the

the use were so limited, that a stranger should have the rent, &c. he should have it, and might distrain for it.

And, though the rent reserved on such a lease made by tenant for life, under a power in a settlement, be reserved to him and his heirs; yet, as it takes effect out of the uses in the settlement, it will enure to those in remainder, according to the limitation thereof. As, where tenant for life by fine, with power to make leases, "*ita quod, super quamlibet talem dimissionem et dimissiones, &c. maxime antiq' et consuet' annual' reddit', heriot', et servitia, sive plus redderentur et reservarentur solubil' durant' dict' dimissione, &c.*" made a lease, "*reddendo et solvendo proinde annuatim post inceptionem dictæ dimissionis, præfate W. ("tenant for life") sen', hæred' et assign' suis, et tali personæ et personis quib' hereditament' præmissorum post mortem præd' W. de jure spectant seu pertineret durante dicto termino 14 s. ad quatuor maxime usualia festa annuatim solvendo, &c.*" It was objected, that this reservation was not made according to the terms of the power; for, it was such that it was not payable during the said lease as it ought to have been, but only during the life of the lessor; for he, having but an estate for life, reserved the rent to him and

Whitlock's
case, 8 Rep.
70.

his heirs; and his heirs could not have it; and the latter words, namely, “ *to such person and persons who had the inheritance of the premises, &c.*” were merely void; for no rent could be reserved but to the lessor, donor, or feoffor, and his heirs, who were privies in blood, and not to any who were privy in estate, as, to him in reversion, remainder, &c. But, it was resolved that this reservation was good; for, the said lease had not its essence from the estate of the lessor which he had for his life, but the lease had its essence out of the fine, and in construction of law, *preceded the estate for life and all the remainders*; for, after the lease made, it was as much as if the use had been limited originally to the lessee for the said term, and then the other limitations, in construction of law followed it: And that was the reason that the usual clause in such indentures, was, that the conuzees and their heirs should stand seised to the use of such lessees, &c. So, that the lessee, in the case at bar, derived his estate out of the estate which passed by the fine. Then, when the lessor reserved rent to him and his heirs, it was good; for *that*, by construction of law, preceded the limitation of the uses, and then it being well reserved, it was well transferred to every one to whom any lease was limited.

So,

So, if the reservation were to the lessor, and to every person to whom the inheritance or reversion of the premises should appertain during the term, that would likewise be good; for the law would distribute to every one to whom any limitation of the use should be made. And, in such case, no rent was reserved to a stranger; for, the reservation preceded the limitation of the uses to strangers.

But, it was agreed in the foregoing case, that the most clear and sure way was, to reserve rent yearly during the term, and leave the law to make the distribution, *without an express reservation to any person.*

And, where a power to lease was restrained to be executed reserving ancient, usual, and accustomed rents, heriots, boons, and services, "*a covenant to keep in repair,*" was held *an ancient boon*, and the omission of it deemed fatal.

Thus, in the case of the Earl of *Cardigan v. Montague*, (on a decretal order on the master's report) where the Duke of *Montague*, tenant for life, without impeachment of waste, had power to lease, reserving the ancient rent

Earl of Cardigan v. Montague, cited 1 Burr. 122. 6 June 1755.

where usually demised, and the best rent where not usually demised, made twenty-four leases. The master's report, as to many of the leases which he reported bad, was submitted to. As where ancient covenants "to grind at mills," or "to pay land tax," were not in the new lease; and where some part "not within the power," was included in the new lease. And as to five of them, which the master reported to be good, exceptions were taken. Their validity turned upon this case. The words of the power were "reserving ancient and accustomed rents, heriots, boons, and services." In the former leases, the tenants covenanted "to keep in repair." That covenant was omitted in *these*. And the Lord Chancellor, after taking some days to consider of it, was of opinion, that, *that* covenant was a boon, and beneficial to the remainder-man; and he held these leases void for want of it. He said, that he was clear upon the argument; but he took time, because there was no case in point. The more he thought of it, the more he was convinced. The *principle* he rested upon, was, "*that the estate must come to the remainder-man in as beneficial a manner, as ancient holders held it.*"

And

And a lease, made under a power reserved to tenant for life, must have inserted therein all *beneficial* clauses and reservations that can tend to *secure* the remainder-man; for, the omission of *usual* covenants, *beneficial* to the owner, will be evidence of a *fraudulent* execution of the power, though they be not particularly mentioned in the power.

Thus, there must be a covenant *for payment of rent* in such leases; for, under a mere reservation, it is not payable until entry; and, therefore, in fact, may never be payable during the term. Besides, if there be no covenant to pay the rent, the lease may be assigned to a succession of beggars.

Per L. Mansfield, 1 Burr. 125.

So, there should likewise be a *clause of re-entry*; for, otherwise, the ground may be unoccupied, without any, or not sufficient distress upon it, so that the remainder-man can neither have his rent nor his land.

Per L. Mansfield. Ibid.

But, if the covenants in such lease, under such a power, be, *upon the whole*, such as leave the parties *upon the same footing* as under former leases, their differing in *trifling* circumstances will not be material.

Dougl.
Rep. 565.
supra 405.
429 433.

Thus, it was objected to the covenants, in the lease from Earl *Ferrer's* to *Funican*, (by one of which she covenanted, that she would pay half the land-tax, amounting to about 7*l.* 10*s.* by the other of which the Earl covenanted for himself, his heirs, &c. to free her from tythes and from levies and payments to the church), that the covenants in the lease were not so *beneficial* to the remainder-man, as those in the ancient leases : for that, in the former leases, the tenants covenanted to pay all duties and taxes, except the land-tax; that church dues were particularly, by law, chargeable upon the occupier; but, by that lease, the landlord covenanted to free the tenants from tythes and all levies and payments of the church. These new covenants, therefore, were *less beneficial* to the remainder-man, than those in the former leases. *Sed, per curiam*, the objection, as to the covenants, was not much relied on, and did not require much consideration. The power made no mention of covenants. The *ground*, therefore, must be, that the present covenants were a *fraud* on the power, by *lessening* the value of the reservation; but, on considering them fully, it appeared, that what is thrown on the landlord was compensated by what was paid by
the

the tenant. She was to pay half the land-tax. As to the church dues, the covenant seemed to be collateral, and not to go with the land, nor to bind the remainder-man, resembling a covenant for quiet enjoyment. But, if it did go with the land, there was no pretence of fraud on the power, the 30% was, *bona fide*, reserved as an ancient rent. What was stipulated with regard to tythes, was of no consequence, since none were payable.

The want of *a counterpart*, in cases of this sort, is an omission, and very prejudicial to the remainder-man; and every *fraudulent, unfair, prejudicial* execution of such a power, in respect of those in remainder, is void at law.

Per Lord Mansfield,
1 Burr. 125.

It is no objection, to a lease under a power, “ that it is *in trust* for *him* who executes the power,” provided the *legal* tenant be bound, during the term, in *all requisite covenants and conditions*.

Per Lord Mansfield,
1 Burr. 124.

Livery is not necessary to a lease for lives *under* a power, (though it be incident thereto at Common Law;) and, *it* hath been held to be a forfeiture of a power; but Lord *Hale*

Wigson v. Garrett,
2 Levinz 149.
1 Vent. 291.
Earl of Leicester's Case, *supra*
68. 71.

conceived it was not a forfeiture, because a lease, by virtue of a power, takes effect out of the settlement that gives the power. And, by sealing the lease, the power is executed; and then the livery comes too late to affect it.

T H E
I N D E X.

A.

Appointment, Power of

need not refer to, or recite the instrument creating the power, if the act done be of such a nature as can have no operation, unless by virtue of the power. *Page* 111, 112
But it must refer to, or mention the estate on which it is to operate, and the want of such reference cannot be supplied by parol evidence. 118

It will be sufficient however, to refer to it in terms which include it with the general property of the donee thereof. 119

includes in itself a right to appoint absolutely, or with power of revocation. 287. 296

cannot be executed with an exemption from the debts of the appointee. 372

Vide Powers.

Assignment

of *totum statum suum*, destroys a power not simply collateral. 26

Assurance

declared or averred to enure to certain uses, with power of revocation, but not to declare new uses, no new or other use can be averred or declared. 273. 281

But new uses may be limited upon a new grant, or by covenant. 281. 283

Attainder.

Vide Revocation, power of.

P P 4

Bargain

I N D E X.

B.

Bargain and Sale

, not effecting an actual transmutation of possession, and so not displacing any estate, will not destroy a power not simply collateral. *Page. 28. 31*
inrolled, will operate as a good execution of a power limited, to be revoked by a writing generally. 256. 259
Contra, if by deed indented and inrolled. *ibid.*
And, if inrollment be expressly required to be made in a particular court, that requisition must be complied with, or it will not operate as a revocation. 259, 260

Bill,

ten days after sight, when due. 513, 514

Boons, Ancient

reserved, include a covenant to keep in repair. 577. 579

C.

Child, Elder

claiming under a power defectively executed, will not be aided in equity against younger children, who would thereby be left destitute. 220, 221

Child, Grand

not considered as *a child* in equity, for the purpose of aiding a power defectively executed to make provision for him. 208. 210
included under a power respecting children. 346. 349

Child, Younger

becoming elder, loses the benefit of an appointment, made by virtue of a power created for the benefit of younger children. 105. 111

Child,

I N D E X.

Child, Younger

may be an only daughter, for though she be not younger in comparison of another, yet she is considered as a younger child, to take a provision limited for a younger child. *Page 105. 111*

means such an one as is not the head of the family. 110

not aided by equity, on a defective execution of a power. if elder will be disinherited thereby. 208. 221

or if the object be to defeat an equality of provision. 210. 221

Children

are purchasers upon a good consideration, 161. 163.
relieved in chancery upon that ground, in cases of powers defectively executed.

Vide Covenant.

provision for, whether voluntary or not, will be aided in equity, if arising out of a power defectively executed.

204, 205, 206

Nor is it material, that they are already provided for, unless the provision be extravagant. 205, 206

On what principle the courts of equity interfere in the latter case. 206

Vide Child, grand.

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528, 529

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541

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, ————— not well executed by a lease for ninety nine years, determinable on three lives.

542

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542. 544

, under power, may be absolute or qualified.

544

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579

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_____appurtenant, may be incumbered by the donee thereof, by charging the land subjected thereto with a rent previous to executing the power, or by covenant to stand seised to another during his life. 16

_____may be destroyed by the donee thereof by release, or alteration of the estate subjected to the power. 17. 26

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• _____ in gross, may be destroyed
donee thereof by fine, feoffment or recovery.

• _____ may be executed, either by deed
by will, unless there be a particular provision to
contrary.

And although the words used in describing the instrument
be such, as, in *their ordinary import*, must be understood
of a deed, yet the execution will be good, though
will.

• _____ by several assurances, although
reserved to be executed by a writing, if they are so related
to each other, that they can be considered as making
one conveyance, as by covenant to levy a fine, and fine
levied accordingly.

And the law will be the same, although the fine precedes
the execution of the deed declaring the uses.
contra, if the fine be general, and not referring to, or re-
ferred, to by the instrument, *see quare*.

• _____ by several acts of several
natures, as by deed to take effect on one hundred pounds,
paid, or the like.

may not be executed by deed or will, at the option of the
donee thereof, or by several assurances, if the *specific*
nature of the instrument by which it is to be executed,
be expressly mentioned.

Exception in case of a power executed in consideration of
marriage.

• the mode of execution of which is conceived in general
terms, or directed to be by deed, or by will expressly,
must be executed by such an instrument, as is, in the
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- not suspended by a lease for years not made pursuant to the power. 16, 17. 308. 310
- , when executed, devests an estate subject thereto vested in the crown, *without office*. 313
- may be extinguished as to part of that which is subjected to it, by donee thereof, by *fine*, &c. 313, 314.

Vide Statute.

S.

Statute

- , 27 Eliz. c. 4. against covenants and fraudulent conveyances. 314, 315

Vide Marriage.

_____, extends to settlements made upon good consideration only, as for provision for children. 316. 318

Vide Lease.

_____, extends to power of revocation, limited to be executed at a distant time. 319, 320. but

_____ does not operate until the time limited for revocation arrives. 320

Statute

I N D E X.

Statute.

27 *Edw. c. 4.* extends to power of revocation, although the power be afterwards extinguished by recovery, feoffment, or fine, &c. if the conveyance be originally voluntary. Page 320. 325

_____, altho' executed by several different assurances, for, as to the operation of this statute, they are all considered as but one conveyance. 325. 327

_____, to conveyance, wherein there is no express power of revocation, if there be circumstances therein which are *tantamount* to such power. 327

_____, not to powers of revocation, restrained to be executed with the consent of a stranger not under the influence of the donee of the power. 328. 335

_____, to conveyances where the power of revocation is upon a *colorable* consideration. 335

_____, not to a power to charge an estate settled with a particular sum by way of mortgage, &c. 335. 336.

_____, cannot be taken advantage of, except by purchasers for money, or other valuable consideration. 336,

Who must likewise be free from all imputation of fraud or deceit. 337

_____, extends to power of revocation, of which a purchaser for valuable consideration has notice; for, his notice will not make that good, which the act of parliament has made void. 337, 338

Vide Registering Acts. 339

T.

Term for Years.

Vide Lease.

Testament

made in execution of a power, attaching upon personal estate, valid, though not executed according to the statute of frauds. 83. 84.

Nor executed in the presence of any witness. 87.

Exception, if the instrument be expressly required to be attested by two witnesses. 88. 90. 142. 147.

Testament

I N D E X.

Testament

made in execution of a power must be proved as such in a regular form, before it can be made use of either in law or equity. Page 90, 91

_____ retains all its essential properties and qualities; consequently the dispositions thereby made are liable to lapse. 91 &

An exception to this rule, or rather case not falling within it. 98. 101

Vide Powers. Revocation of. *Vide Covenant.*

Trust Estate.

Vide Purchasers.

V.

Valuable Consideration.

Vide Consideration.

Volunteers

, several, claiming under a power, he whose title has any defect in circumstances, will be without remedy in equity. 148. 151

U.

Uses

limited with power of revocation, but not to limit new uses, no new or other use can be averred or declared under the assurance that creates the power, 273. 281

But new uses may be limited by a new grant, or by covenant upon a consideration expressed. 281. 283

Vide Instrument.

W.

Wife

, applying to equity to make good a defective execution of a power intended for a provision for her, will be aided there, whether such provision be made before or after marriage. 204, 205, 206.

Nor is it material that she is already provided for. *ibid.*

Unless the provision before made be extravagant. *ibid.*

In which case, the court will not interfere. 206

On what principle, *ibid.*

Vide Covenant.

will.

Vide Devise, Testament.

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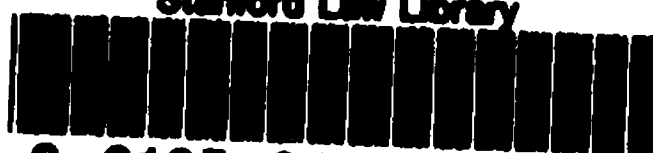
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